

NORTH CAROLINA
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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

WACHOVIA MORTGAGE COMPANY v. AUTRY-BARKER-SPURRIER REAL
ESTATE, INC.; KLUTTS REALTY AND CONSTRUCTION COMPANY,
INC.; J. VAUGHN KLUTTS, JOY W. KLUTTS, RICHARD W. AUTRY,
PATRICIA D. AUTRY, ROBERT N. SPURRIER, BLANDINA W. SPURRIER
AND JOHN J. BARKER

No. 7726SC967

(Filed 5 December 1978)

1. Rules of Civil Procedure § 56.3— motion for summary judgment— methods of satisfying burden of proof

The party moving for summary judgment can satisfy his burden of establishing the lack of any triable issue of fact either by proving that an element of the opposing party's claim is nonexistent or by showing, through discovery, that the opposing party cannot produce evidence to support an essential element of its claim.

2. Mortgages and Deeds of Trust § 32— action for deficiency—alleged breach of agreement to provide permanent financing for purchasers—summary judgment

In an action to recover deficiencies remaining after the foreclosure sale of property securing land and condominium construction loans, the trial court properly entered summary judgment for plaintiff mortgage company on defendants' claim that plaintiff breached an agreement to provide permanent loans at competitive interest rates for purchasers of the condominiums.

3. Guaranty § 1; Reformation of Instruments § 7— claim for reformation of guaranty agreement—fraud and mistake—summary judgment

Summary judgment was properly entered for plaintiff mortgage company on the individual defendants' claim for reformation of an agreement in which they guaranteed the debts and obligations of the corporate defendants "now existing or hereafter arising" on the ground that the parties had agreed that the guaranty would be prospective only, and that the provision as to existing

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debts was placed in the written guaranty by fraud and mistake on the part of plaintiff, where plaintiff presented evidence (1) that the provision was part of a printed form guaranty agreement, (2) that no mistake was made by any employee of plaintiff with respect to provisions of the guaranty, and (3) that no oral discussions occurred between representatives of plaintiff and the individual defendants regarding the insertion of a provision that the guaranty would have prospective application only; plaintiff's evidence included a deposition by one individual defendant that no statements had been made to him by any representative of plaintiff that the guaranty would apply only prospectively; and the individual defendants presented only an affidavit by this same individual defendant contradicting his deposition.

4. Rules of Civil Procedure § 56.4— opposition to motion for summary judgment—affidavit contradicting deposition—no question of fact

A party opposing a motion for summary judgment will not be allowed to create an issue of fact by filing an affidavit contradicting his prior sworn testimony in a deposition.

5. Mortgages and Deeds of Trust §§ 9, 32— action for deficiency judgment—defense of wrongful release of property—summary judgment

In an action to recover a deficiency judgment, the trial court properly granted summary judgment for plaintiff on defendants' defense that plaintiff had released property as security for the loans in question without defendants' knowledge or consent where plaintiff presented evidence that defendants not only had knowledge of the releases but that the releases had been made at their request, such evidence included the deposition of one defendant that to his knowledge plaintiff had never released any property from the loans in question without his knowledge, and defendants relied on the affidavit of the same defendant contradicting his deposition.

APPEAL by defendants from order of *Martin, Judge (Harry C.)* entered 12 August 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1978.

This is a civil action instituted on 12 November 1975 to recover deficiencies of \$303,925.92 and \$147,198.20 remaining after foreclosure sale of property securing a land acquisition and development loan and a construction loan made to the corporate defendants by plaintiff. The two loans were made in connection with a townhouse development project known as Treva Woods in Mecklenburg County. The initial land acquisition and development loan of \$500,000.00 was evidenced by a note and deed of trust dated 14 March 1973 and was executed by all defendants. The construction loan of \$576,200.00 was evidenced by a note and deed of trust dated 18 October 1973 and was executed by the corporate defendants. In connection with the construction loan, all of the in-

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dividual defendants executed a printed form guaranty agreement which stated in pertinent part:

[T]he undersigned . . . unconditionally guarantees to the Lender and its successors, endorsees and assigns the punctual payment . . . of all debts and obligations of the Borrower . . . now existing or hereafter arising . . . provided, however, the liability of the undersigned hereunder shall not exceed at any one time a total of Six hundred fifty thousand Dollars (\$650,000) . . .

By answer filed on 30 January 1976 and amended answers filed on 9 July 1976 and 2 June 1977, defendants denied liability for the alleged deficiency; alleged that the value of the property sold at foreclosure exceeded the amount of the debt as their Second Defense; and alleged various other defenses and a counterclaim in their Third, Fourth, Fifth, Sixth and Seventh Defenses which are more fully set out in the opinion. On 8 July 1977, plaintiff moved for partial summary judgment with regard to defendants' Third Defense and Counterclaim, and their Fourth, Fifth, Sixth and Seventh Defenses. On 10 August 1977, the trial court, after considering the pleadings, depositions, exhibits, answers to interrogatories, and affidavits, entered an order granting plaintiff's motion for partial summary judgment in its entirety. Defendants appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, William L. Rikard, Jr., and Heloise C. Merrill, for the plaintiff appellee.

Mraz, Casstevens & Davis, by John A. Mraz, for the defendant appellants.

HEDRICK, Judge.

[1] All of the defendants' assignments or error relate to the granting of partial summary judgment for plaintiff. Under Rule 56, summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The judge's role in ruling on a

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motion for summary judgment is to determine whether any material issues of fact exist that require trial. It necessarily follows that when the only issues to be decided in the case are issues of law, summary judgment is proper. 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2725, at 498-500 (1973). The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). The movant can satisfy this burden either by proving that an essential element of the opposing party's claim is nonexistent or by showing, through discovery, that the opposing party cannot produce evidence to support an essential element of its claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

[2] Defendants first contend that the trial court erred in entering summary judgment for plaintiff with respect to the Third Defense and Counterclaim of defendant Klutts Company, which alleged:

4. [T]he Plaintiff and the corporate Defendants entered into an agreement pursuant to which Plaintiff agreed to commit Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for conventional loans to eventual purchasers of said townhouse units at interest rates competitive to rates charged in Mecklenburg County by other mortgage lenders.

5. Thereafter the corporate Defendants submitted loan applications of qualified borrowers who had agreed to purchase townhouse units in the project, but the Plaintiff breached its agreement and refused to provide such financing notwithstanding the repeated requests of the corporate Defendants that it do so.

6. By reason of Plaintiff's breach of its contract to provide the permanent loan funds to purchasers as herein alleged, the corporate Defendants were unable to sell completed townhouse units, their total marketing program collapsed, and the corporate Defendants became unable to meet their financial obligations with respect to the project, all of which caused the Defendant Klutts Realty and Construction Company, Inc., to be damaged in excess of Seven Hundred Fifty Thousand Dollars (\$750,000.00).

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The agreement upon which defendant bases its counterclaim is a letter dated 13 March 1973, sent to the corporate defendants, stating:

In accordance with your request, Wachovia Mortgage Company has approved a commitment of \$2,500,000.00 for conventional permanent home loans on the above-referenced project. This commitment will be subject to the following conditions:

1. A first mortgage on the property described in the application with title evidence satisfactory to us.

2. All legal requirements are subject to the usual approval and acceptance by Wachovia Mortgage Company.

3. The loans are to be closed at no expense to Wachovia Mortgage Company.

4. A commitment fee of \$25,000.00 is required as consideration for holding funds available.

5. This commitment is good for three years from the date of this letter.

In lieu of a cash deposit, we will accept a Non-Interest Bearing Note for \$25,000.00, representing one per cent (1%) of the permanent loans to be delivered from this project. One per cent (1%) of all permanent loans delivered to Wachovia Mortgage Company from this project will be credited against this Note until the Note is paid. As security for the above mentioned Note, we will require a mortgage subject to Wachovia's other liens on the subject property. This mortgage will be recorded in the name of Wachovia Mortgage Company.

The commitment contract also contains the following provisions written in Mr. Klutts' handwriting:

6. Permanent Loan Rates to be competitive with Cameron Brown Co. and NCNB.

7. Permanent Loans available up to 95% loan to value to qualified buyers.

8. 15 to 20% flexibility of total loans outside Wachovia without penalty or forfeiture fee.

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Plaintiff introduced evidence in support of its motion for summary judgment that tends to show the following: (1) From March through May 1974, only four individuals who entered into contracts to purchase townhouses submitted applications to Wachovia for conventional permanent home loans. (2) All four were approved for permanent loans. (3) Three of these four ultimately closed their loans. (4) After 16 May 1974, no further customers were referred to Wachovia for loans. (5) In its answers to Plaintiff's interrogatories, Klutts Company has failed to identify a single prospect who turned down the opportunity to purchase a townhouse because an interest rate was not quoted to him prior to or at the time he applied for a loan or because Wachovia failed to approve the loan application submitted to it.

From the foregoing, we think plaintiff has introduced sufficient evidence to support its motion for summary judgment by showing that there was no breach of the contract, thus negating an essential element of the defendant's counterclaim.

Once the movant has introduced sufficient evidence in support of his motion, under G.S. § 1A-1, Rule 56(e),

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific *facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (Emphasis added.)

The only evidence offered by defendant in opposition to plaintiff's motion was that showing the custom in the real estate industry to quote firm interest rates at the time of the negotiations for a sales contract or at the time of the loan application. Defendant advanced this evidence in support of its contention that the commitment agreement must be construed in accordance with industry custom to ascertain its true meaning. The evidence upon which defendant relies concerns a legal issue rather than a factual one; that is, the proper construction of the commitment agreement by Wachovia. Defendant contends that the commitment contract should be construed to require plaintiff to quote firm interest rates at a particular time. The contract, however,

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contains no provisions whatsoever requiring that permanent mortgage interest rates be quoted to prospective borrowers at any time.

It is well established that when the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court and the court cannot add terms to the contract. *Taylor v. Gibbs*, 268 N.C. 363, 150 S.E. 2d 506 (1966); *Weyerhaeuser Company v. Carolina Power & Light Company*, 257 N.C. 717, 127 S.E. 2d 539 (1962). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971).

Assuming that the affidavits filed by the defendant in opposition to plaintiff's motion for summary judgment with respect to the counterclaim conform to the provisions of Rule 56(e) requiring affidavits to "set forth such facts as would be admissible in evidence," we are of the opinion that the defendants have failed to "set forth specific facts showing that there is a genuine issue for trial." Thus, with respect to defendant's Third Defense and Counterclaim, summary judgment was proper.

Next the individual defendants argue that the court erred in granting summary judgment with respect to their Fifth, Sixth, and Seventh Defenses, which, except where quoted, are summarized as follows:

"Prior to the preparation of the written [guaranty] agreement, the individual defendants and plaintiff orally negotiated the terms of the agreement" and "orally agreed that the guaranty agreement would apply prospectively only." In reducing the oral agreement to writing, the "above provision was mistakenly omitted from the guaranty agreement and erroneously inserted in its place was the statement that the individual defendants guaranteed the debts and obligations of the corporate defendants 'now existing or hereafter arising'."

"Plaintiff represented to the individual defendants that the written guaranty agreement embodied in full the actual agreement between the parties," and the individual defendants, in "reasonable" reliance on the "material" misrepresentation of the plaintiff "failed to read the agreement before signing."

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"Plaintiff, fraudulently and with intent to deceive" inserted the above provision making the guaranty apply to "a Promissory Note executed by the corporate defendants on March 14, 1973."

The individual defendants "pray that the Court reform the guaranty agreement" by "deleting from it the provision that the guarantee applies to obligations of the corporate defendants incurred prior to October 18, 1973."

Rule 9(b) of the Rules of Civil Procedure provides that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." G.S. § 1A-1, Rule 9(b). Assuming arguendo that the defendants have alleged in their Fifth, Sixth, and Seventh Defenses the circumstances constituting fraud and mistake "with particularity" and that they have not alleged an insurmountable bar to their claim for reformation by alleging that they signed the guaranty before reading it thus rendering their claim vulnerable to a Rule 12(b)(6) motion to dismiss or a Rule 12(f) motion to strike, we proceed to consider the propriety of the trial judge's order allowing plaintiff's motion for summary judgment with respect to these defenses.

[3] Plaintiff introduced evidence in support of its motion for summary judgment tending to establish the following facts: (1) that the provision complained of by defendants was part of a printed form guaranty agreement; (2) that no mistake was made by any person at Wachovia with respect to the terms and provisions that were included in the guaranty agreement; (3) that no oral negotiations or discussions occurred between the individual defendants and any representatives of Wachovia regarding the provision in question or regarding insertion of a provision that the guaranty would have prospective application only.

In further support of its motion, plaintiff introduced the deposition of J. Vaughn Klutts, pertinent portions of which, with regard to the guaranty agreement, contain the following testimony:

Q. Then, if I understand your testimony, Mr. Klutts, you have never had any discussions with Mr. Ferrol Edmondson or any other Wachovia Mortgage Company representative about any provision of Plaintiff's Exhibit Number 14?

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A. I don't recall specifically having any discussion with any representatives.

...

Q. What statements were made to you by Wachovia representatives about the personal guaranty?

A. About the personal guaranty? This document?

Q. Yes.

A. None as I remember.

In opposition to plaintiff's motion for summary judgment on the reformation issue, defendants rely on an affidavit of J. Vaughn Klutts, filed on 27 July 1977, one day prior to the hearing on plaintiff's motion. In his affidavit, Mr. Klutts states:

Mr. Edmondson told your affiant that the personal guaranty would apply to the construction loan obligation only, and that it would not apply to the land acquisition and development loan obligation or any other obligations which Klutts Realty and Construction Company, Inc. had with Wachovia Mortgage Company. Your affiant, relying on these statements from Mr. Edmondson, executed the guaranty agreement.

[4] The question thus presented for our review is whether a party opposing a motion for summary judgment by filing an affidavit contradicting his prior sworn testimony has "set forth specific facts showing that there is a genuine issue for trial" as required by G.S. § 1A-1, Rule 56(e). We think a party should not be allowed to create an issue of fact in this manner and thus hold that contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant. *See, Radobenko v. Automated Equipment Corp.*, 520 F. 2d 540 (9th Cir. 1975); *Perma Research & Development v. Singer Co.*, 410 F. 2d 572 (2d Cir. 1969). When confronted with this same question, the Court of Appeals for the Second Circuit, in the *Perma Research* case, held that no genuine issue of fact was raised, stating: "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly

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diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Id.* at 578.

[5] The individual defendants’ final argument is that the trial court erred in granting summary judgment with respect to their Fourth Defense. The pertinent provisions of the individual defendants’ Fourth Defense allege:

1. [T]he plaintiff, by its conduct and manner of dealing with the corporate defendants in extending credit, altering loan transactions, extending time, and in failing to prudently look after its loans and security . . . substantially destroyed and damaged the right of reimbursement of the individual defendants . . .

2. [T]he plaintiff, without notice to or the consent of the individual defendants, released property which stood as security for the loans upon which plaintiff now claims a deficiency judgment . . . By reason of such action of the plaintiff, the individual defendants have been released and discharged from any obligations to the plaintiff.

The evidence introduced by plaintiff in support of its motion tended to show that the individual defendants not only had knowledge of the releases in question, but also that the releases had been made at their request.

In opposition to plaintiff’s motion for summary judgment, defendants rely on an affidavit of J. Vaughn Klutts, filed on 27 July 1977, one day prior to the hearing on plaintiff’s motion. In his affidavit, Klutts states that he “neither received notice nor consented to the release” of the properties in question. This statement is in direct contradiction with his earlier deposition testimony, wherein he stated: “To my knowledge Wachovia has never released any property from either the construction loan or the land acquisition loan without my knowledge.” As such, this affidavit is insufficient to show the existence of a genuine issue of material fact. *See, Radobenko v. Automated Equipment Corp., supra; Perma Research & Development Co. v. Singer Co., supra.*

We hold partial summary judgment with respect to defendants’ Third Defense and Counterclaim, Fourth, Fifth, Sixth and Seventh Defenses was appropriate and the order appealed from is

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affirmed, and the cause is remanded to the Superior Court of Mecklenburg County for further proceedings.

Affirmed and remanded.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. CHARLES JAMES SMITH

No. 7818SC361

(Filed 5 December 1978)

1. Homicide § 30.3— first degree murder charged—evidence of involuntary manslaughter insufficient to require instruction

Though decedent's daughter testified in a first degree murder prosecution that defendant told her that he had stabbed decedent but that he didn't mean to, the trial court did not err in failing to submit to the jury the lesser included offense of involuntary manslaughter, since the record did not reveal that the homicide resulted from an accident; defendant admitted to a police officer that he did "slash" the deceased in self-defense; and the evidence showed that defendant took his knife out of his boot before he stabbed deceased.

2. Homicide § 28.4— first degree murder—right to stand ground—no instruction required

In a prosecution for first degree murder defendant was not entitled to an instruction concerning one's right to defend himself in his own home or the home or curtilage of his host, since the evidence tended to show that the fatal stabbing occurred in a courtyard which served as a common area for all the apartments in a complex, rather than in the apartment of defendant's host.

3. Homicide § 28.2— self-defense—reasonableness of defendant's apprehension of bodily harm—possession of weapon by decedent

The trial court in a first degree murder prosecution properly instructed the jury with respect to self-defense when he stated that the jury should determine the reasonableness of defendant's belief that he was about to suffer death or serious bodily harm, and one of the circumstances to be considered in determining the reasonableness of defendant's belief was whether decedent had a weapon in his possession.

4. Homicide § 27.1— voluntary manslaughter—jury instructions proper

The trial court in a first degree murder prosecution properly instructed the jury concerning the lack of malice if defendant acts in the heat of passion upon sudden provocation, and the court adequately explained how malice is negated in the case of one defending himself.

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5. Homicide § 21.5— first degree murder—sufficiency of evidence

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that defendant and deceased who was drunk exchanged harsh words; defendant drew his knife but put it away when he saw that deceased had no weapon; defendant and deceased then went to separate apartments in an apartment complex for about 15 minutes; and defendant then rushed out of his apartment to the common area of the apartments where he and deceased engaged in a scuffle during which defendant fatally stabbed deceased.

6. Homicide § 24.1— presumptions arising from use of deadly weapon—jury instructions proper

Defendant in a first degree murder prosecution was not deprived of due process of law by the trial court's charge to the jury that it could infer malice and unlawfulness simply from the fact that the defendant used a deadly weapon in stabbing the deceased.

APPEAL by defendant from *Seay, Judge*. Judgment entered 15 December 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 August 1978.

Defendant was charged in a proper bill of indictment with murder in the first degree of James Henry Hawks on or about 18 September 1975 and was convicted by a jury of murder in the second degree. Defendant was given an active sentence of not less than thirty (30) nor more than forty (40) years in the State Prison.

At the trial, the State presented evidence tending to show that: on 18 September 1975, James Hawks was helping a girl to move into an apartment complex in Greensboro where his daughter, Patricia Horne, lived; defendant was visiting the apartment of one Ray Pulliam at the same time, and his automobile was in the way of the people attempting to move in; Patricia asked defendant to move his car, which he did; at that point, James Hawks came out of the girl's apartment and began directing abusive language toward defendant; Hawks was staggering and did not have control of his faculties; he told defendant he had a gun and reached for his pocket; defendant pulled out his switchblade knife, opened it, and started toward Hawks; Patricia told defendant that Hawks was drunk and not to pay any attention to him, that he did not have a gun and that he acted abusive like that when he was drunk; Hawks pulled his hand out of his pocket

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and did not have a weapon; defendant put his knife away and returned to Pulliam's apartment, and Hawks went to his daughter's apartment for a few moments; Hawks then yelled at his daughter, and at this point, defendant came out of Pulliam's apartment again; Hawks stated that he would slap defendant and swung at defendant but missed; there was a scuffle between the two men, and Hawks staggered back several steps and fell over; he had been fatally stabbed in the abdomen.

Patricia Horne testified, "I asked Buster (defendant) if he had stabbed my father and he said, 'Yes, I stabbed him, but I didn't mean to.'"

The defendant's evidence tended to show from the testimony of Ray Pulliam that Wayne Walker had inflicted the fatal wound. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers and Associate Attorney T. Michael Todd, for the State.

Norman B. Smith, for defendant appellant.

ERWIN, Judge.

[1] The defendant brings forward twelve questions on appeal and contends that if error is found in any of them, the defendant is entitled to a new trial. We find no reversible error for the reasons that follow.

The first question reads:

"I. Did the superior court commit prejudicial and reversible error in failing to submit to the jury the lesser included offense of involuntary manslaughter?"

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice: (1) by some unlawful act not amounting to a felony or naturally dangerous to

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human life; or (2) by an act or omission constituting culpable negligence. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), and *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959).

The trial court must instruct the jury as to the lesser-included offense of the crime charged if there is evidence upon which the jury could find that the defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976), and *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). Defendant relies on a statement made by him to the decedent's daughter, who testified, " 'Yes, I stabbed him, but I didn't mean to.' As to how Buster said this to me, it was like he didn't really care." The record does not reveal that the homicide resulted from an accident. Defendant admitted to one Police Officer Kisby that he did "slash" the deceased in self-defense. The evidence shows that defendant took his knife out of his boot before he stabbed the deceased. We hold that the evidence in this case would not support a verdict of involuntary manslaughter. We do not find error in the court's failing to charge on this issue.

[2] Question II reads:

"II. Did the superior court commit prejudicial and reversible error by failing to instruct the jury that where a person who is free from fault in bringing on a difficulty is attacked in his own home or in the home or within the curtilage of the home of his host, the law imposes upon him no duty to retreat before he is justified in fighting in self-defense, regardless of whether he is attacked with deadly force or is only the victim of a simple assault?"

Officer Johnson testified:

"[I]n other words, the apartment complex is a horseshoe and the sidewalks go in in the front. And on the southwest side, on the interior of the courtyard, Mr. Hawks was lying on the courtyard just off the sidewalk to the east side of the sidewalk. As to how far his body was to the nearest apartment complex, it was approximately 25 feet into the courtyard from the backside of the complex."

From the record, it appears to us that the courtyard was set up as a common area to be used by all the tenants with no special

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rights of possession to any. The charge suggested by this question would not have been warranted under the evidence of this case. All the evidence set forth in the record is that the fatal stabbing occurred outside the apartments in the common area. See *State v. Pearson*, 20 N.C. App. 203, 200 S.E. 2d 814 (1973), cert. denied, 284 N.C. 621 (1974). We overrule this assignment of error. In doing so, we also answer Questions III and IV in the negative.

[3] Question V reads:

"V. Did the superior court commit prejudicial and reversible error in its instruction to the jury on the subject of reasonableness of the defendant's belief that he was in danger of death or great bodily harm, since the superior court stressed that the jury should consider whether or not James Hawks actually had a weapon in his possession in determining the reasonableness of the defendant's apprehension?"

The defendant complains of the trial court's charge to the jury as follows:

"[It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances, as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to James Henry Hawks, the fierceness of the assault (sic), if any, being made upon the defendant, Charles James Smith, whether or not James Hawks had a weapon in his possession, and the reputation, if any, of James Henry Hawks for danger and violence.]

* * *

[Further, members of the jury, the killing of James Henry Hawks would be justified on the ground of self-defense, and it would be your duty to return a verdict of not guilty under the circumstances as they existed at the time of the killing, the State of North Carolina has failed to satisfy you beyond a reasonable doubt of the absence on the part of

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Charles James Smith of a reasonable belief that he was about to suffer death or serious bodily harm at the hands of James Henry Hawks or that Charles James Smith used more force than reasonably appeared to him to be necessary, or that Charles James Smith was the aggressor.]"

In *State v. Deck*, 285 N.C. 209, 214, 203 S.E. 2d 830, 834 (1974), our Supreme Court, in an opinion by Justice Branch, stated the general rule applicable to the defense of self-defense as follows:

"The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249; *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447; *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24."

Deck, supra, was followed in *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975). We cannot find any distinction between the charge before us and those approved by our Supreme Court. We find no merit in this contention of the defendant.

[4] Question VI reads:

"VI. Did the superior court commit prejudicial and reversible error in failing to define fully for the jury the circumstances in which the killing is without malice and amounts to voluntary manslaughter—particularly with reference to the defendant who uses excessive force when defending himself or whose apprehension of great bodily harm is unreasonable?"

The trial court charged the jury as follows:

"[A killing is not committed with malice if the defendant acts in the heat of passion upon sudden provocation. The heat of passion does not mean mere anger. It means that the

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defendant Charles James Smith's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions—adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition—and the stabbing took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.]”

Defendant contends that the charge was not adequate to explain how malice is negated in the case of one defending himself. However, the trial judge charged further:

“The burden of proof is on the State of North Carolina to prove beyond a reasonable doubt that the defendant, Charles James Smith, did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, Smith, though otherwise acting in self-defense, used excessive force, or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.”

When the above portions of the charge are taken together plus the remainder of the charge, we find no error. “A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.” *State v. McWilliams*, 277 N.C. 680, 684-5, 178 S.E. 2d 476, 479 (1971). See also *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); 4 Strong, N.C. Index 3d, Criminal Law, § 168, p. 853.

[2] In Question VIII, the defendant contends that the trial court's instruction to the jury was incomplete, in that the court failed to charge the jury “of the right of the defendant to stand his ground and not retreat in the face of a felonious assault and its failure to give an instruction on his right to stand his ground and not retreat, regardless of the character of the assault if he was assaulted within the curtilage of the home of his host.” We hold the evidence in the case *sub judice* does not warrant such an instruction. The evidence shows that the stabbing occurred in the common area of the apartment complex.

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[5] The ninth question reads:

"IX. Did the superior court commit prejudicial and reversible error by denying the defendant's motion for nonsuit as to the charge of murder in the first degree and by submitting to the jury as a possible verdict the charge of murder in the second degree?"

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. 6 Strong, N.C. Index 3d, Homicide, § 4, p. 530. Viewing the evidence most favorable to the State, as required on a motion for judgment as of nonsuit, we find no error. Premeditation and deliberation could have been found from defendant after having had harsh words with the deceased, waiting around some fifteen minutes, and then rushing outside to engage the deceased in a fight, from which he received a fatal stab wound.

This Court held in *State v. Alston*, 17 N.C. App. 718, 719-20, 195 S.E. 2d 312, 313-14 (1973):

"Defendant assigns as error that the trial judge submitted to the jury, and instructed thereon, the issue of first degree murder. The jury actually found defendant guilty of only second degree murder.

'Where defendant is convicted of murder in the second degree, any error in the instructions of the court relating to murder in the first degree cannot be held prejudicial in the absence of a showing that the verdict of second degree murder was thereby affected.' 4 Strong, N.C. Index 2d, Homicide, § 32, p. 261. There is no such showing in this case. 'Also, a verdict of guilty of murder in the second degree renders immaterial the court's refusal to direct a verdict of not guilty to the capital charge.' 4 Strong, N.C. Index 2d, *supra*. See also *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667."

We overrule this assignment of error.

By holding that the State presented sufficient evidence to submit this case to the jury on the offense of murder in the first degree, it follows that the offense of murder in the second degree

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was properly submitted to the jury, and the evidence properly supports a conviction by the jury.

[6] Defendant contends by Question XII that he was deprived of due process of law under the Fourteenth Amendment to the United States Constitution when the trial court charged the jury that it could infer malice and unlawfulness simply from the fact that the defendant used a deadly weapon in stabbing the deceased.

A similar charge as appears in this record set out in Question V was approved by our Supreme Court in *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975). Justice Branch stated for the Court as follows:

"We are of the opinion that when the State proves beyond a reasonable doubt that an accused intentionally inflicted a wound with a deadly weapon proximately causing death, such basic facts are sufficient to meet the most stringent of the standards of due process recognized by the Court. Establishment of the presumption requires the triers of fact to conclude that the prosecution has met its burden of proof with respect to the presumed fact by having established the required basic facts beyond a reasonable doubt. This does not shift the ultimate burden of proof from the State but actually only shifts the burden of going forward so that the defendant must present some evidence contesting the facts presumed. We, therefore, hold that the presumptions here challenged comport with due process." 288 N.C. at 689-90, 220 S.E. 2d at 566.

We find no merit in this assignment of error.

A careful review of the record fails to disclose any prejudicial error, and all other assignments of error relating to the charge are without merit.

No error.

Judges PARKER and CLARK concur.

Bentley v. Langley

RICHARD PAUL BENTLEY ADMINISTRATOR OF THE ESTATE OF CAROL JEAN BENTLEY, DECEASED v. JOHN T. LANGLEY, GEORGE EDWARD FLEMING, EDNA ROUSE & LENOIR COUNTY MEMORIAL HOSPITAL, INC.

No. 788SC87

(Filed 5 December 1978)

1. Evidence § 28.1; Rules of Civil Procedure § 56.4— affidavit—facts upon which opinion based

A physician's affidavit presented in opposition to a motion for summary judgment set forth sufficient facts upon which the affiant's opinion was based where it appeared that he based his opinion on statements in depositions of two other physicians presented in support of the motion.

2. Physicians, Surgeons and Allied Professions § 11.1— affidavit of physician from another state—knowledge of standards in similar locations

The affidavit of an anesthesiologist licensed to practice in New York was properly considered upon motion for summary judgment in a malpractice action in this state where the affiant stated that he was familiar with standards of care for the administration of anesthetics in hospitals under similar circumstances and similar locations as the defendant hospital.

3. Physicians, Surgeons and Allied Professions §§ 12, 19— cardiac arrest during surgery—death from brain damage—negligence by nurse anesthetist, surgeon, anesthesiologist

In an action to recover for the death of plaintiff's wife resulting from massive brain damage sustained when she suffered cardiac arrest during a laminectomy performed by defendant surgeon, the affidavit of an anesthesiologist presented by plaintiff in opposition to a motion for summary judgment was sufficient to raise issues of fact as to (1) whether defendant nurse anesthetist negligently failed to monitor the patient properly, (2) whether defendant surgeon and defendant anesthesiologist were negligent in failing adequately to supervise the nurse anesthetist, and (3) whether defendant surgeon and defendant anesthesiologist were negligent in failing promptly to resuscitate the patient after she suffered cardiac arrest.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 10 May 1977 in Superior Court, WAYNE County. Heard in Court of Appeals 24 October 1978.

On 29 August 1975, plaintiff instituted this action for damages arising from the negligent treatment of plaintiff's wife during a laminectomy performed by Dr. Langley at the Lenoir County Memorial Hospital on 30 August 1973. The defendants answered the complaint and denied the plaintiff's allegations of negligence. In 1976, defendant Rouse died, and the executors of

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her estate, Patty Rouse Harper and Henry C. Harper were substituted as party defendants.

On 5 April 1977, defendants Langley and Fleming moved for summary judgment on the grounds that there was no negligence. On 5 April 1977 defendant hospital and defendant Rouse also moved for summary judgment. On 10 May 1977, the court allowed defendants' motions. From this judgment, plaintiff appeals.

Kornegay & Rice by George R. Kornegay, Jr. and Robert T. Rice for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for defendant appellees, Edna Rouse and Lenoir County Memorial Hospital, Inc.

Smith, Anderson, Blount & Mitchell by C. Ernest Simons, Jr. and James D. Blount, Jr. for defendant appellees, Drs. John T. Langley and George Edward Fleming.

CLARK, Judge.

Summary judgment is appropriate only where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). The movant's materials in support of summary judgment must be carefully scrutinized, and the non-moving parties' materials must be indulgently regarded. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). Any doubt must be resolved in favor of the party opposing the motion for summary judgment. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971). If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971). *See*, Louis, A Survey of Decisions under the New North Carolina Rules of Civil Procedure, 50 N.C.L. Rev. 729, 740-744 (1972).

In the case *sub judice*, the defendants supported their motions for summary judgment with depositions of Dr. Langley and Dr. Fleming.

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DEPOSITION OF DR. LANGLEY

Dr. Langley was performing a laminectomy on Mrs. Bentley on 30 August 1973 at the Lenoir County Memorial Hospital. Nurse Edna Rouse was present in the operating room and was administering anesthetics and monitoring the vital signs of the patient. Dr. Fleming, the anesthesiologist, was not present in the operating room. Dr. Langley had exposed the disc that was to be removed and at about 2:15 p.m., Rouse notified him that the patient had no blood pressure or heart action. Dr. Langley stopped the operation and straightened out the operating table, which was in a jack-knife position. Mrs. Bentley was lying in a prone position on the jack-knifed table so as to expose the operative site. Nurse Rouse called Dr. Fleming to assist in resuscitating Mrs. Bentley, and he arrived about 45 seconds later. Dr. Fleming turned the patient to a face-up position and Dr. Langley resuscitated her with a closed cardiac massage. Nurse Rouse stopped administering anesthetics and began supplying the patient with full oxygen. Mrs. Bentley was resuscitated and Dr. Langley completed the laminectomy. After the operation, it was discovered that Mrs. Bentley had suffered massive brain damage; she died several days later.

There was a lapse of less than ten seconds between the time Dr. Langley was informed of the cardiac arrest and the time Dr. Fleming was called. About 45 seconds transpired before Dr. Fleming arrived and the patient was resuscitated within three to five minutes after his arrival. Nurse Rouse informed Dr. Langley that the vital signs were stable immediately preceding the cardiac arrest, and that she had taken Mrs. Bentley's blood pressure within two minutes immediately preceding the cardiac arrest.

Dr. Langley did not know what caused the cardiac arrest and had never formed an opinion as to the cause. He had discussed numerous possibilities, such as whether there were any anesthetic difficulties, any trauma during intubation, and whether there was inadequate ventilation or equipment failure.

DEPOSITION OF DR. FLEMING

Dr. Fleming testified that when he arrived in the operating room, Mrs. Bentley had been in cardiac arrest for "less than a few minutes." Her pupils were dilated and she was mildly

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cyanotic when he arrived. Usually the patient's pupils dilate within three to five minutes after the complete cessation of blood to the brain. It is standard medical practice to record a patient's blood pressure every ten minutes, and that Nurse Rouse had done so every five minutes.

We do not deem it necessary to determine whether or not the defendants have met their burden of establishing that there was no genuine issue of material fact because plaintiff presented materials in opposition to the motions which show that there is a genuine issue of negligence as to each of the defendants.

Plaintiff opposed defendants' motions by presenting an affidavit by Dr. Barnett A. Greene, a copy of the agreement between Dr. Fleming and Lenoir Memorial Hospital, Inc., a copy of the job description for a nurse anesthetist and a copy of the anesthesia record.

[1] Defendants contend that the affidavit is defective because it is not based on personal knowledge and does not set forth the facts upon which the doctor's opinion was based. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). See, *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976); and *Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973). The affidavit of Dr. Greene provides in pertinent part:

"1. I am an anesthesiologist, a medical doctor specializing in the field of giving anesthesia, and am duly licensed in the State of New York. I am Board-certified in the specialty and have instructed in a training program for nurse anesthetists.

2. I have reviewed the Lenoir County Memorial Hospital records from Kinston, North Carolina, regarding the care given to Carol Jean Bentley for her hospitalization from August 28, 1973, to September 6, 1973.

3. I am familiar with the standards of care for the administration of anesthesia in similar circumstances in similar localities.

* * * *

6. If resuscitation had been as prompt and as effective as Dr. Langley and Dr. Fleming indicate in their depositions,

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after the nurse anesthetist finally advised them of the complication then Mrs. Bentley, in all medical probability, suffered from a loss of blood oxygen for a period of time before the nurse anesthetist advised Dr. Langley and Dr. Fleming of the complication. The nurse anesthetist, Edna Rouse, was negligent in failing to detect and treat the hypoxia before it had progressed to where it caused permanent brain damage.

* * * *

8. Edna Rouse was a nurse anesthetist, and by law and by customary practice was not entitled to administer anesthesia or prescribe prescription drugs, which are inherent in the administration of anesthesia, except under the direct supervision and direction of a physician who is responsible for the monitoring of her physiologic condition, the diagnosis of any abnormalities therein, and the prescribing of proper treatment for those abnormalities. Edna Rouse, the nurse anesthetist, therefore of necessity had to act under the direction of the patient's physicians Dr. Langley and Dr. Fleming.

9. Dr. John T. Langley was negligent in failing to maintain that degree of skill and knowledge necessary for proper supervision of Edna Rouse. To the extent that Dr. George Fleming undertook to provide anesthesia services and to supervise Edna Rouse, he was also responsible for the anesthesia services administered."

The anesthesia record contains no time sequence of the events occurring immediately after the cardiac arrest. That information is contained only in the depositions of Dr. Langley and Dr. Fleming. Paragraph 2 of Dr. Greene's affidavit states that he reviewed the "hospital records" in forming his opinion, but the anesthesia record contains no facts from which he could draw any conclusions as to whether the nurse failed to detect the cardiac arrest, when it occurred, or whether the resuscitation by the doctors was not prompt. In paragraph 6, however, Dr. Greene refers to the information contained in the depositions of Drs. Langley and Fleming, and therefore, it is apparent that he was basing his opinion on their statements in the depositions as well as on the anesthesia record. Although the affidavit is not as detailed as it

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should have been, it is sufficient in this case because it appears that Dr. Greene did review the depositions of the two doctors.

[2] Defendants' contention that the affidavit cannot be considered because Dr. Greene is not familiar with North Carolina medical standards is also without merit. In paragraphs 1 and 2, Dr. Greene states that he is a licensed anesthesiologist familiar with standards of care for the administration of anesthetics in hospitals under similar circumstances and similar locations as the Lenoir County Memorial Hospital. Therefore, the information set forth in the affidavit is sufficiently specific to meet the requirements of Rule 56(e).

[3] Although the depositions of the two doctors tend to show that no negligence occurred which caused the cardiac arrest, and that there was no negligence in monitoring the patient or in resuscitating her, the affidavit of Dr. Greene indicates that the massive brain damage sustained by Mrs. Bentley would not have occurred if resuscitation had been as prompt and effective as the doctors indicated in their depositions. Dr. Greene has placed the credibility of the three defendants squarely in issue and has raised an issue of fact as to whether Nurse Rouse failed to monitor the patient properly, or in the alternative, whether the doctors were too slow in resuscitating Mrs. Bentley. The plaintiff has discredited the movants' evidence and has pointed out the existence of a genuine issue of fact for the jury sufficient to withstand defendants' motions for summary judgment.

Dr. Greene also states in his affidavit that as a customary practice, and by law, Nurse Rouse was not entitled to administer drugs except under the "direct supervision and direction of a physician. . . . Edna Rouse, the nurse anesthetist, therefore of necessity had to act under the direction of the patient's physicians Dr. Langley and Dr. Fleming." (Emphasis added.) The deposition of Dr. Fleming also tended to show that he was in charge of assigning nurses to patients and that his job included supervising the nurses' work. The affidavit of Dr. Greene had raised a genuine issue of negligence for the jury to determine, as well as an issue as to which of the defendants were directly negligent or were negligent in failing to adequately supervise Nurse Rouse.

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The affidavit of Dr. Greene leaves much to be desired because the factual basis for his opinions are not set forth with sufficient specificity. However, in light of the rule that on a motion for summary judgment, the nonmoving parties' materials must be indulgently regarded, *Page, supra*; *Miller, supra*, we find that the affidavit was sufficient to meet the requirements of Rule 56(e).

The granting of summary judgment in favor of defendants is reversed.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JAMES P. VERT

No. 784SC611

(Filed 5 December 1978)

1. Kidnapping § 1.2— kidnapping and armed robbery—restraint and asportation separate from robbery—separate, punishable offenses

In a prosecution for armed robbery and kidnapping, defendant's contention that there was insufficient evidence to support the kidnapping conviction because the evidence failed to show a restraint in violation of G.S. 14-39(a), separate and apart from the restraint inherent in the commission of the armed robbery, is without merit since the restraint and asportation of the victim consisted of moving her from the convenience store to a hallway in the rear of the building and tying her to a grocery cart; such restraint and asportation were not necessary to and not part of the armed robbery; and the elements of the kidnapping and the robbery were not the same and the two were thus separate and distinct offenses.

2. Criminal Law § 138; Robbery § 6.1— armed robbery—severity of sentence—determination by General Assembly

Defendant's contention that G.S. 14-87(c), providing that a person convicted of a violation of G.S. 14-87(a) must serve the first seven years of his sentence without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except for time allowed for good behavior is unconstitutional because it usurps the inherent power of the courts to suspend a sentence and the constitutional power of the executive branch to grant reprieves, commutations and pardons is without merit, since the General Assembly has exclusive power to determine the penalogical system of the State and to prescribe the punishment for crimes.

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APPEAL by defendant from *Small, Judge*. Judgment entered 15 March 1978, in Superior Court, ONSLOW County. Heard in the Court of Appeals 24 October 1978.

The defendant was convicted as charged of armed robbery and kidnapping. He was also charged with assault with a deadly weapon with intent to kill inflicting serious injury but was found guilty of assault with a deadly weapon inflicting serious injury. Defendant appeals from judgments imposing a prison term of 40 years on the charge of armed robbery, and concurrent terms of 10 years on the charge of assault with a deadly weapon inflicting serious injury and 25 years on the charge of kidnapping.

The evidence for the State tends to show that about 12:30 a.m. on 11 November 1977, Betsy Norton, clerk, was alone in the Stop-N-Go Store, when a man appeared at the counter, pointed a gun at her, and ordered her to open the cash register. She set off an alarm in the Sheriff's office. There were several bills, ones, fives, and tens in the cash register but less than \$75.00. Defendant ordered her to take a "Closed" sign and hang it on the front door. Defendant ordered her to go to the hall at the back of the store. There defendant shot her in the hip, forced her to tell him how to open the safe, left her to move around in the store for two minutes, returned and tied her hand to a shopping cart, then left the store.

A sheriff's deputy arrived in time to see a person fitting defendant's description running from the store and ordered him to halt. Defendant was apprehended about an hour later in a vehicle about 0.4 miles from the store. A search of the area revealed items of clothing similar to the items worn by the defendant.

Betsy Norton identified the defendant as the perpetrator. She was hospitalized for seven weeks. The bullet is still in her hip.

Defendant offered no evidence.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer for the State.

Tharrington, Smith & Hargrove by Roger W. Smith for defendant appellant.

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CLARK, Judge.

[1] First, the defendant contends that there was insufficient evidence to support the kidnapping conviction because the evidence failed to show a restraint, in violation of G.S. 14-39(a), separate and apart from the restraint that is inherent in the commission of armed robbery, as required by the decision in *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978).

G.S. 14-39(a) provides in pertinent part that confinement, restraint or removal of the victim for the purpose of "(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony" constitutes the crime of kidnapping.

We find no need to quote at length from the thorough and learned opinion of Justice Lake in *Fulcher*. In treating the double jeopardy question, Justice Lake wrote:

"... We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word 'restrain,' as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony." 294 N.C. at 523, 243 S.E. 2d at 351.

In *Fulcher*, the Supreme Court of North Carolina rejected the decision of this Court (34 N.C. App. 233, 237 S.E. 2d 909) to the effect that, to meet Due Process and Equal Protection standards, kidnapping is not committed unless the defendant confined or restrained the alleged victim for a substantial period of time or moved the victim a substantial distance. Justice Lake wrote: "Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed." 294 N.C. at 522, 243 S.E. 2d at 351.

In applying the principles of law in *Fulcher* to the evidence in the case *sub judice*, though we do not have to resort to a stop

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watch or tape measure, we do have the task of determining whether the restraint or removal of Betsy Norton by the defendant was separate and apart from that which was inherent in the commission of the armed robbery. If the kidnapping was an inherent, inevitable feature of the armed robbery, then the conviction and punishment of the defendant for both crimes would violate the constitutional prohibition against double jeopardy.

In *Fulcher*, the defendant forced his way into a motel room and bound the hands of two women, and by the threatened use of a deadly weapon forced each to commit a crime against nature. It was held that the kidnapping was complete and separate and apart from the crime against nature offenses subsequently committed, and that defendant's conviction and punishment for both kidnapping and crime against nature did not constitute double jeopardy.

Subsequent to *Fulcher*, the Court again considered the double jeopardy question. In *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978), the defendant was charged with (1) armed robbery, (2) assault with intent to commit rape, (3) crime against nature, and (4) kidnapping. The victim was reading in the restroom of a bus station while waiting for relatives to meet her. The defendant with a knife forced her to go into the last stall of the restroom, to sit on the commode where he rubbed his private parts against hers and fondled her with his hands, and forced her to perform oral sex. Thereafter, he demanded and received two dollars from her. The jury returned verdicts of guilty as to each of the four charges. From judgments imposing concurrent sentences defendant appealed. The court rejected the argument that the other crimes charged were lesser offenses of kidnapping. Justice Branch for the Court wrote:

"... The charges so alleged were not *elements* of the offense of kidnapping which the State had to prove as is the case of the underlying felony in the felony murder rule. When the State proves the elements of kidnapping and the purpose for which the victim was confined or restrained, conviction of the kidnapping may be sustained. Thus, the crimes of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon are separate and distinct offenses and are punishable as such. . . ." 295 N.C. at 406, 245 S.E. 2d at 748.

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In *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1931), the court adopted the "same evidence" test for determining the presence of double jeopardy where a defendant has been charged with multiple crimes. This principle of law has led to the doctrine of the lesser included offense. The controlling factor is whether the alleged multiple crimes have different elements. If so, they are separate and distinct offenses even though one crime was committed during the perpetration of the other in a continuous course of criminal conduct. It appears that the Supreme Court of North Carolina adheres to this "same evidence" test. *State v. Banks, supra*; *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). And see *State v. Richardson*, 279 N.C. 621, 635, 185 S.E. 2d 102, 111 (1971), (Higgins, J., concurring in part, dissenting in part) where Justice Higgins dissents from the majority decision which upheld the felonious assault conviction and advocates the "same transaction" test. See Note, Waiver of Double Jeopardy Right: The Impact of *Jeffers v. United States*, 14 Wake Forest L. Rev. 842 (1978).

The crime of kidnapping in *Banks, Fulcher, Richardson* and the case *sub judice* were committed during a continuous course of conduct which involved the commission of other offenses, but the other crimes had elements in addition to and not included within, the elements of the crime of kidnapping. Therefore, the multiple offenses are separate and distinct. In the case *sub judice* the restraint and asportation of the victim consisted of moving her from the store to a hallway in the rear of the building and tying her to a grocery cart. It was not necessary to and not a part of the armed robbery, and the elements of the two offenses are not the same. The defendant's argument is overruled.

[2] Defendant next attacks the constitutionality of G.S. 14-87(c) which provides:

"Any person who has been convicted of a violation of G.S. 14-87(a) shall serve the first seven years of his sentence without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except such time as may be allowed as a result of good behavior, whereby the period of actual incarceration of the person sentenced is reduced to a period of less than seven years. Sentences imposed pursuant to this section shall run con-

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secutively with and shall commence at the expiration of any other sentences being served by the person sentenced hereunder.

Notwithstanding any other provision of law, neither the Parole Commission nor any other agency having responsibility for release of inmates prior to expiration of sentences shall authorize the release of an inmate sentenced under this section prior to his having been incarcerated for seven years except such time as may be allowed as a result of good behavior."

The defendant contends that the power of the trial courts to suspend a sentence is an inherent power and the power to grant "reprieves, commutations, and pardons" is vested in the executive branch under N.C. Const., art. III, § 5(6), and that the usurpation of these powers by the legislative branch is unconstitutional.

The Supreme Court of North Carolina has long recognized the power of the state trial courts to stay execution of judgments upon conviction in a criminal prosecution and to suspend judgments on terms that are reasonable and just. *State v. Lewis*, 226 N.C. 249, 37 S.E. 2d 691 (1946); *State v. Henderson*, 207 N.C. 258, 176 S.E. 758 (1934); *State v. Edwards*, 192 N.C. 321, 135 S.E. 37 (1926).

In *State v. Lewis*, *supra*, the court stated that the power of the trial courts to suspend judgment was both inherent and statutory. The power to suspend sentences referred to in *Lewis* does not mean exclusive power that cannot be abridged by the Legislature. Rather, it is the authority possessed by and exercised by the courts in administering the punishment for crime prescribed by the Legislature. See Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1 (1974).

It is noted that G.S. 15A-1331(a) provides:

"The criminal judgment entered against a person in either district or superior court may, unless the offense for which his guilt has been established is a capital offense, or unless a statute otherwise specifically provides, include a sentence in accordance with the provision of this Article to one or a combination of the following alternatives:

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- (1) Probation as authorized by Article 82, Probation, or a term of imprisonment as authorized by Article 83, Imprisonment; or
- (2) A fine as authorized by Article 84, Fines; or
- (3) Other punishment authorized or required by law."

It is established that the Legislature has exclusive power to determine the penalogical system of the State and to prescribe the punishment for crime. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971); *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A. 2d 897 (1942), 143 A.L.R. 1473 (1943).

In *Jernigan*, the court upheld the constitutionality of that part of G.S. 148-62 which empowered the Board of Paroles to direct that a returned prisoner shall serve the remainder of any sentence upon which his parole was revoked after the completion of the sentence for a new crime. The Court pointed out that the Legislature may establish a parole system and may assign the granting of parole and supervision of parolee to the Board of Paroles, and that it may give to the Board the option of prescribing the order in which sentences may be served upon revocation of parole.

The contentions of the defendant attacking the constitutionality of G.S. 14-87(c) cannot be sustained.

We have carefully examined and considered defendant's other assignments of error in light of the rule that a new trial will be granted only if the error is prejudicial. G.S. 15A-1443(a) provides that "[a] defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." We find no prejudicial error.

No error.

Judges WEBB and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. JAMES WILLIAM LANE

No. 784SC624

(Filed 5 December 1978)

1. Criminal Law § 45— demonstration of what defendant showed witness—no experimental evidence

In a prosecution of defendant for murder of his seven month old baby, the trial court properly permitted the police officer to whom defendant had made a statement to demonstrate to the jury the manner in which defendant had shown him he shook the baby without showing substantially similar circumstances, since no experimental evidence was involved, but the witness was merely testifying to what defendant had told and shown him.

2. Criminal Law § 53.1— expert testimony—cause of death—hypothetical question—failure to include all evidence

In a prosecution of defendant for murder of his seven month old child, the trial court did not err in permitting the State to ask its medical expert a hypothetical question designed to elicit an opinion as to whether defendant's shaking of the child could have caused the hemorrhage which resulted in his death without including any reference to evidence that the baby had fallen from a bed earlier the same day, especially since the State thereafter posed a second hypothetical question concerning causation which included in its hypothesized facts the fall but omitted any references to the shaking, and defendant subjected the medical expert to a searching cross-examination.

3. Criminal Law § 53.1— expert testimony—cause of death—violence in shaking of child

There was sufficient evidence of violence in the shaking of a seven month old child to form the basis of a medical expert's opinion that a hemorrhage which resulted in the child's death was caused by a "violent" backward and forward motion of the child's head where a police officer's testimony as to what defendant told and showed him tended to show a vigorous shaking of the child by defendant which made the child's head snap back.

4. Criminal Law § 139— involuntary manslaughter—imposition of maximum sentence

The trial judge did not abuse his discretion in imposing on defendant the maximum sentence of imprisonment for involuntary manslaughter.

APPEAL by defendant from *Small, Judge*. Judgment entered 22 February 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 25 October 1978.

Defendant was tried for the second degree murder of his seven months old baby boy. The State presented evidence to show that late on the afternoon of 27 June 1977 the unconscious

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baby was taken by ambulance to the hospital. He died on 1 July 1977 after having been maintained on a ventilator for four days with no discernible brain activity or spontaneous respiration present. Autopsy revealed the cause of death as a bilateral subdural hemorrhage.

Defendant told the police that he had returned home from work on 27 June 1977 to find the baby crying. He picked the baby up and shook him. In the course of this shaking, the baby's head snapped back and then fell limp against his chest. After the defendant made unsuccessful attempts to revive the baby, he told his wife to call an ambulance.

Medical experts testified that the bilateral subdural hemorrhage could have been caused by a shaking of the baby. The pathologist who performed the autopsy testified on cross-examination:

At that point [after he had been informed that a shaking had been involved] since the injuries are entirely consistent with a shaking injury and are the sort of injuries that are seen with the shaking of infants at that age I then was able to conclude that the injuries were indeed due to shaking. No sir, it does not exclude all other possibilities. It is just more consistent with the shaking episode.

The defendant did not present evidence. The court allowed defendant's motion for nonsuit as to the charge of second degree murder and submitted the case to the jury on charges of manslaughter and involuntary manslaughter.

The jury found defendant guilty of involuntary manslaughter, and the court sentenced defendant to prison for a term of ten years.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

Louis Jordan for defendant appellant.

PARKER, Judge.

[1] Defendant first contends that the court erred in overruling his objections and permitting the police officer to whom defendant had made a statement to demonstrate to the jury the man-

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ner in which defendant had shown him he shook the baby. Citing *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948) for the proposition that experimental evidence is competent only when the experiment is carried out under substantially similar circumstances, defendant contends that the police officer, who was a larger individual than the defendant, should not have been permitted to make the demonstration before the jury. Defendant's reliance upon *State v. Phillips, supra*, is misplaced. No experimental evidence was involved here. The witness was merely testifying to what the defendant had told and shown him concerning the manner in which he shook his baby. In so testifying it was entirely proper for the witness not only to repeat before the jury the substance of the words which defendant had used in making his statement but also to show the jury the physical actions which defendant had used while making his statement. The court did not err in overruling defendant's objections to the officer's testimony.

[2] The defendant next contends that the trial court erred in overruling his objection to a hypothetical question asked of one of the medical expert witnesses, Dr. Zumwalt, the pathologist who had performed the autopsy which established the cause of the child's death as a bilateral subdural hemorrhage. The hypothetical question was designed by the State to elicit the medical expert's opinion as to whether the shaking could have caused the bilateral subdural hemorrhage. The defendant contends that his objection to the hypothetical question should have been sustained because the question did not include any reference to a fall from bed which the child had suffered earlier in the afternoon of 27 June 1977 according to a statement made by defendant to the police.

This contention of the defendant is without merit. The medical expert answered the question excepted to and then explained his answer. Immediately thereafter, the State posed a second hypothetical question concerning causation which included in its hypothesized facts the fall but omitted any reference to the shaking. In the clearest fashion possible the State thus set forth the opposing contentions as to causation. The defendant was given full benefit of a hypothetical question centered on his contentions and cannot now justly complain of the earlier question which was based on the State's theory of causation. Furthermore, the defendant received additional protection in the form of

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vigorous cross-examination of the medical expert witness. This was yet another safeguard against any distortion of the opinion evidence adduced by the hypothetical question to which defendant excepted. As Justice Branch pointed out in *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976):

The general rule is that a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper and the expert's answer to such a question will be excluded. However, it is not necessary to include in the hypothetical question all the evidence bearing upon the fact to be proved. The adversary has the right to present other phases of the evidence in counter-hypothetical questions so as to supply omitted facts and to ask the expert on cross-examination if his opinion would have been modified by the inclusion of such omitted facts. *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89; *State v. Stewart*, 156 N.C. 636, 72 S.E. 193.

290 N.C. at 230, 226 S.E. 2d at 28-29.

In the present case, the State itself presented another phase of the evidence in a counter-hypothetical question, and the defendant was able to subject the expert to a searching cross-examination.

[3] The defendant also assigns error to the trial court's denial of his motion to strike Dr. Zumwalt's explanation of the basis of his opinion that the hemorrhage was caused by shaking. Dr. Zumwalt testified that if the head of an infant of seven months "is violently moved backward and forward in a whiplash fashion, the brain moves back and forth and in relation to the cranial vault." The defendant argues that his motion to strike should have been granted because there was no evidence that a violent shaking occurred. We do not agree, and accordingly find no error. First, we point out that the defendant made a broadside motion to strike without specifying which portion of Dr. Zumwalt's answer was objectionable. The defendant does not question the competence of anything in Dr. Zumwalt's answer other than the reference to violence in the shaking. Where only a portion of a witness's testimony is incompetent, and we do not find that any of it was

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incompetent as we will discuss below, the party moving to strike should specify the objectionable part and move to strike it alone. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968). The trial court may, in its discretion, strike the incompetent testimony, but it is under no duty to winnow out the bad from the good. Accordingly, the trial court will ordinarily overrule a broadside motion to strike if part of the testimony at which the motion is directed is competent. *State v. Pope, supra*. Second, in this case we find that ample evidence had been presented about violence in the shaking to form the basis of Dr. Zumwalt's testimony. Sgt. Sennec related on direct examination the account given to him by defendant of the shaking:

He put his hands in a manner like this, he put his hands under the child's armpits and shook him hard.

* * *

I said, "how hard"? He said hard enough to change the pitch of his voice, ah-ah-ah, like that. His head snapped back.

On cross-examination, Sgt. Sennec said:

In my opinion the illustration I gave of the vigorous shaking is the way Mr. Lane demonstrated it.

Taken together, this testimony of Sgt. Sennec tends to show a vigorous shaking which made the infant's head snap back. This evidence was sufficient to permit Dr. Zumwalt to testify in terms of a violent backward and forward motion of the child's head. Defendant's assignment of error directed to the denial of his motion to strike Dr. Zumwalt's testimony is overruled. Furthermore, this same analysis of the evidence as to violence of the shaking leads us to overrule the defendant's assignment of error directed to the trial court's allusion to violent shaking in its summary of the State's evidence.

[4] Finally, the defendant assigns error to entry of the judgment, contending that the court erred by considering irrelevant testimony at the sentencing hearing and by imposing the maximum sentence of imprisonment for involuntary manslaughter. Again, we do not agree and find no error. "Formal rules of evidence do not apply at the [sentencing] hearing." G.S.

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15A-1334(b). "It suffices to say that trial judges have a broad discretion, and properly so, in making a judgment as to proper punishment. They must not be hampered in the performance of that duty by unwise restrictive procedures." *State v. Locklear*, 294 N.C. 210, 213, 241 S.E. 2d 65, 67 (1978). "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962). No such showing has been made in this case. Defendant's final assignment of error is overruled.

In defendant's trial and in the judgment imposed we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

RAY D. COLLINS v. QUINCY MUTUAL FIRE INSURANCE COMPANY

No. 7721SC857

(Filed 5 December 1978)

1. Insurance § 126— fire insurance—plaintiff as tenant in common with two others—no notice of ownership given insurer

In an action to recover on a fire insurance policy where defendant refused to pay more than one-third of the amount of the loss because plaintiff owned the insured property with two other persons as tenants in common, there was no triable issue as to whether defendant had notice of the ownership of the property and thereby waived limitation of coverage to the amount of plaintiff's interest, since knowledge as to title of the property imported to an independent insurance broker would not be imputed to defendant; employees of the general agent for defendant executed affidavits stating that notice was not given to the general agent that plaintiff was not the sole owner of the property; and even if notice of plaintiff's interest was given to defendant's general agent after issuance of the policy and before the loss in question, no waiver of limitation of recovery to plaintiff's interest could be inferred.

2. Insurance § 115— fire insurance—plaintiff as manager of damaged property—insurable interest—summary judgment limiting recovery improper

In an action to recover on a fire insurance policy where the policy covered any loss plaintiff might have including loss as managing agent of the

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insured property, there was a triable issue as to whether plaintiff was the manager of the property which he owned with two other persons, and the trial court erred in granting defendant's motion for summary judgment limiting plaintiff's recovery to one-third of the damage to the property.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 10 June 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 August 1978.

The plaintiff has appealed from the entry of a summary judgment against him in the Superior Court of Forsyth County. The plaintiff owned as tenant in common with two other persons a house and lot in Forsyth County. In January 1973 the plaintiff asked a Mr. Roger Swisher to obtain fire insurance on the house. Mr. Swisher called Betty Capps at Jack Hoots Insurance Service, Inc. and requested that a policy be issued on the house. The Jack Hoots Insurance Service, Inc., as general agent for the defendant, issued to plaintiff a standard fire insurance policy for North Carolina. This policy complied with G.S. 58-176 and among other things, it gave the name of the insured as Ray D. Collins. It contained the following pertinent language: "this Company . . . does insure the insured named above and legal representatives, to the extent of the actual cash value of the property at the time of loss, . . . against all direct loss by fire. . . . This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein. . . ."

The policy was for \$15,000.00 and its effective date was 10 January 1973. The plaintiff paid all premiums on the policy. The house was damaged by fire on 4 January 1976. The plaintiff filed a claim with the defendant, and the defendant refused to pay more than one-third the amount of the loss. The plaintiff filed this action, and the defendant made a motion for summary judgment. At the hearing on the motion for summary judgment, the defendant offered the deposition of Roger Swisher and the affidavits of Jack Hoots, president and general manager of Jack Hoots Insurance Service, Inc. and Betty Capps, office manager and book-keeper for Jack Hoots Insurance Service, Inc. Roger Swisher testified by deposition that he is a self-employed insurance broker who has never been employed by Jack Hoots Insurance Service, Inc. He testified further that in January 1973, Ray D. Collins ask-

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ed him to procure a fire insurance policy on a house he owned with two other persons, that he procured the policy from Jack Hoots Insurance Service, Inc. in the name of Ray Collins and did not tell Jack Hoots Insurance Service, Inc. that anyone else owned an interest in the property. At one point Roger Swisher said:

"there is a possibility that I did inform them that Ray was acting as an agent for an association, a group. It seems to me that at some time or other, in the course of this period of three years, that I did say to them that Ray Collins was acting as an agent for a partnership association."

Jack Hoots and Betty Capps each testified by way of affidavit that they had never been informed that anyone other than Ray D. Collins had any interest in the property.

The court granted the defendant's motion for summary judgment, limiting the plaintiff's recovery to one-third of the damage to the property. The plaintiff appealed.

Badgett, Calaway, Phillips and Davis, by Susan Rothrock Montaquila and Richard G. Badgett, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and Keith W. Vaughan, for defendant appellee.

WEBB, Judge.

At the outset we note that this is a proper case for a motion for summary judgment to be considered. The defendant relied on affidavits and the deposition of Roger Swisher, which showed there could be no genuine issue as to the material facts as to notice to it in regard to the ownership of the property. The plaintiff did not offer any proof to dispute the deposition testimony, or affidavits. There being no dispute as to the facts, summary judgment should be considered. *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, cert. denied, 279 N.C. 348, 182 S.E. 2d 580 (1971). We must determine whether on these undisputed facts the defendant is entitled to a judgment as a matter of law.

[1] The plaintiff contends summary judgment was not proper for two reasons: (1) there is a triable issue as to whether the defendant had notice of the ownership of the property and (2) the plain-

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tiff had an insurable interest as managing agent of the property, which interest was covered by the policy. We discuss first the plaintiff's contention as to notice. The policy insured the interest of the plaintiff in the property. He is limited in his recovery to the amount of his interest unless the defendant waived this condition by having knowledge of the title to the property. *Grabbs v. Insurance Co.*, 125 N.C. 389, 34 S.E. 503 (1899); *Hardin v. Insurance Co.*, 189 N.C. 423, 127 S.E. 353 (1925). The plaintiff contends it is a jury issue as to whether the defendant had this knowledge. Both sides agree that Roger Swisher was an insurance broker who was not an agent of defendant. *Williams v. Insurance Co.*, 21 N.C. App. 658, 205 S.E. 2d 331 (1974). The knowledge as to the title of the property imparted to Mr. Swisher would not be imputed to defendant. The affidavits of Jack Hoots and Betty Capps each say notice was not given to the Jack Hoots Insurance Service, Inc. that plaintiff was not the sole owner of the property. The plaintiff contends these affidavits were refuted so that there was a triable issue by evidence which showed the plaintiff gave only a minimal description of the property to Roger Swisher, and the policy was issued with a good description of the property. The plaintiff contends this gives rise to an inference that this information had to have been acquired by the defendant by further inquiry or some contact with the plaintiff. Conceding this to be true, there is still no evidence that at the time of the contact the defendant was informed as to the title to the property.

The plaintiff also contends that the deposition testimony of Roger Swisher in which he said that it seemed to him that at some time during the three years he said to Jack Hoots Insurance Service, Inc. that plaintiff was acting as agent for the property served to put defendant on notice. The difficulty with this argument is that it is not evidence that the defendant's agent was informed of the ownership at the time the policy was written. Our Supreme Court has held that knowledge imparted to a general agent of an insurance company after the policy is written is not knowledge upon which a waiver to a condition in the policy may be inferred. *Johnson v. Insurance Co.*, 201 N.C. 362, 160 S.E. 454 (1931); *Smith v. Insurance Co.*, 193 N.C. 446, 137 S.E. 310 (1927). There is authority otherwise from other jurisdictions (see 45 C.J.S., Insurance, § 694, p. 654), but we can find none in this state. We affirm the summary judgment so far as it holds there

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was no waiver by the defendant based on knowledge as to the title.

[2] We come next to the plaintiff's contention that he had an insurable interest as managing partner which was covered by the policy. A valid insurable interest is an interest that furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of the insurance. 43 Am. Jur. 2d, Insurance, § 466, p. 507. It does appear that the plaintiff in his capacity as managing agent had an expectation of pecuniary benefit from the continued existence of the property. This would give him an insurable interest as managing agent. The question then becomes whether the policy insured this interest. The language of the policy is as follows: "Company . . . does insure [Ray Collins] . . . to the extent of the actual cash value of the property . . . against all direct loss by fire. . . ." The defendant contracted to insure Ray Collins against fire loss. The question is whether this insurance of him against fire loss includes any loss he might have, including loss as managing agent, or whether it includes only loss he might sustain as owner of the property. We believe the proper construction of the policy is that it should cover all the interests of the plaintiff. The only case we have found comparable to the case at bar is *Phoenix Insurance Co. v. Brown*, 53 Tenn. App. 240, 381 S.W. 2d 573, 577 (Tenn. App., E.S. 1964), *cert. denied* by Supreme Court, 15 July 1964. On a similar factual situation, the Court of Appeals in Tennessee affirmed a judgment allowing recovery by the plaintiff and said:

"Under the proof in this case, Walter Brown acted as the agent of the owner in looking after the property and keeping it insured. If he had failed to procure insurance he might have been held responsible for the loss and we think, . . . he had an insurable interest."

We hold that there is a triable issue as to whether the plaintiff was the manager of the property he owned as tenant in common with two other persons. If he was managing agent, he does have an insurable interest and the policy covered it.

We note that the defendant has not in its pleadings attempted to void the policy for misrepresentation as to ownership of the property and in its brief it specifically says it is not relying on this as a defense.

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The plaintiff has also brought forward an assignment of error as to the court's refusal to allow him to amend the caption of the complaint. In view of the position we have taken in this opinion, we do not pass on this assignment of error.

Reversed and remanded.

Judges MORRIS and HEDRICK concur.

PAUL REEVES, ET AL., PLAINTIFFS v. DONALD MUSGROVE, ET AL., DEFENDANTS

No. 7823DC68

(Filed 5 December 1978)

1. Boundaries § 8; Reference § 8.2— referee's report rejected—no further reference required—trial by jury proper

The trial court in a proceeding to determine the boundary between the parties' land which was before it for the third time did not err in declining to order a reference, nor did it err in ordering a jury trial in its discretion, since an earlier consent reference order was put into effect and complied with by a full report of the referee which was later rejected by the court as insufficient, and the right of the parties to a reference was therefore not denied; and since the referee's report did not determine the issues and it became incumbent upon the trial court to try the issues, the court was authorized, in its discretion and either upon motion or on its own initiative, to order trial by jury on any or all issues presented. G.S. 1A-1, Rule 39(b).

2. Boundaries § 15.1— location of boundary—sufficiency of evidence

In a proceeding to determine the boundary line between the parties' land, evidence was sufficient to be submitted to the jury where all the evidence indicated that the boundary was as contended by defendants and the disputed parcel of land was a part of defendants' land.

APPEAL by plaintiffs from *Osborne, Judge*. Judgment entered 28 September 1977 in District Court, ALLEGHANY County. Heard in the Court of Appeals sitting in Winston-Salem 14 November 1978.

Edmund I. Adams for plaintiff appellants.

Arnold L. Young and R. Lewis Alexander for defendant appellees.

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MITCHELL, Judge.

The plaintiffs, Paul T. and Cornelia R. Reeves, initiated this action by filing a complaint on 8 March 1973 in which they alleged that the defendants, Donald and Louise Musgrove, had taken possession of a parcel of the plaintiffs' land by building a fence enclosing that parcel. The plaintiffs sought to have the defendants ejected therefrom. The defendants answered admitting the plaintiffs' ownership of the land with the exception of the parcel enclosed by the defendants' fence. The defendants additionally alleged that the parcel of land in question was a part of the defendants' land adjacent to the land of the plaintiffs identified in the complaint.

The trial court, with the consent of the parties, ordered a reference. The referee conducted a hearing and reported *inter alia* that the plaintiffs held superior title to the parcel of property in dispute and that it should be awarded to them. The referee's report was submitted to the trial court, at which time the plaintiffs moved that the report be adopted. The defendants then moved to amend their complaint to deny entirely the plaintiffs' title to all land identified in the complaint. The trial court granted this motion by the defendants, adopted a portion of the referee's report and entered judgment in favor of the plaintiffs.

The defendants appealed from the trial court's judgment. This Court held that the amendment to the defendants' answer converted the action from a processioning proceeding to establish a boundary into an action to try title. As this issue of title had not been raised in the hearing before the referee, we held that his report purporting to adjudge superior title in the plaintiffs could not stand and ordered a new trial. *Reeves v. Musgrove*, 23 N.C. App. 535, 209 S.E. 2d 346 (1974).

The case was thereafter again heard before the trial court, which purported to reverse its prior ruling by denying the defendants' motion to amend their answer so as to deny title in the plaintiffs. The trial court then adopted the referee's report in its entirety and entered judgment in favor of the plaintiffs. This Court vacated the judgment and remanded the case for trial on all issues raised by the pleadings as amended. *Reeves v. Musgrove*, 29 N.C. App. 760, 226 S.E. 2d 235 (1976).

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When this case came before the trial court for the third time, the trial court declined to order a reference and, in its discretion, ordered a jury trial. During this trial, the defendants presented evidence tending to show that they shared a common source of title with the plaintiffs. The parties then entered into a stipulation to the effect that the issue before the court involved the location of the boundary between the land of the plaintiffs and the land of the defendants and not a dispute concerning title to all of the land described in the plaintiffs' complaint. Both the plaintiffs and the defendants offered evidence through registered land surveyors. The surveyors gave conflicting testimony as to the exact location of the boundary. When the case was submitted to the jury, it returned a verdict indicating that the disputed parcel of land belonged to the defendants. The trial court entered judgment adjudging the defendants to be the rightful owners of the disputed parcel. The plaintiffs appealed.

[1] The plaintiffs first assign as error the trial court's rulings on their objection to a jury trial and their motion for another reference of the case to a referee. When the case was called for trial the third time, the plaintiffs objected to a jury trial and moved for an additional reference in accord with the original consent of the parties to a reference prior to the first trial. The objection was overruled and the motion denied.

Once a reference has been ordered with the consent of both parties, the trial court may not revoke it absent the consent of all parties. *Coburn v. Timber Corp.*, 257 N.C. 222, 125 S.E. 2d 593 (1962); *Keith v. Silvia*, 233 N.C. 328, 64 S.E. 2d 178 (1951). "Either party has a right to have the order carried into effect and complied with by a full report of the referee, and further action by the court can only be had upon such report." *Stevenson v. Felton*, 99 N.C. 58, 61, 5 S.E. 399, 400 (1888) (citations omitted).

Here, however, the referee submitted a full and final report of the trial court. Upon its receipt of the referee's report, the trial court was free to "adopt, modify or reject the report in whole or in part. . . ." G.S. 1A-1, Rule 53(g)(2). On appeal, this Court held that the report was insufficient to support a judgment on the issues then pending before the trial court. *Reeves v. Musgrove*, 23 N.C. App. 535, 209 S.E. 2d 346 (1974). This amounted to a rejection of the report. As the consent reference

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order was put into effect and complied with by a full report of the referee which was later rejected as insufficient, the right of the parties to a reference was not denied.

When an appellate court finds a referee's report to be faulty and remands a case, the trial court may again order a reference or make its own findings. *See Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965) and 11 Strong's N.C. Index 3d, Reference, § 9, p. 161. *But see Morisey v. Swinson*, 104 N.C. 555, 10 S.E. 754 (1889). Therefore, the trial court did not err in denying the motion for a further reference in this case, after the original referee's report was found by this Court to be inadequate to support the trial court's prior judgment.

Where the parties to an action consent to a reference, they waive the right to have any of the issues within the scope of the reference determined by the jury. G.S. 1A-1, Rule 53(b)(1). If the issues are presented to the referee, but his report does not determine them, the trial court may properly choose not to again submit the issues to a referee. It then becomes incumbent upon the trial court to try these issues. Notwithstanding the waiver by the parties in the present case of their right to trial by jury, the trial court was authorized, in its discretion and either upon motion or on its own initiative, to order trial by jury on any or all issues presented. G.S. 1A-1, Rule 39(b). *But cf. Morisey v. Swinson*, 104 N.C. 555, 10 S.E. 754 (1889) (decided under the former Code). Therefore, the objection to trial by jury was properly overruled.

[2] The plaintiffs next assign as error the trial court's denial of their motion for a directed verdict as to the defendants' counterclaim. The plaintiffs contend that the evidence was insufficient to show that the true boundary was that alleged by the defendants and, therefore, was insufficient to show that the defendants owned the disputed parcel of land as was alleged in the counterclaim. We do not agree. The motion by the plaintiffs for a directed verdict had the effect of testing the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the defendants. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). In determining whether the evidence is sufficient in such cases, all of the evidence must be considered in the light most favorable to the nonmoving party,

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and he must be given every reasonable inference that may be drawn therefrom. *Oliver v. Royall*, 36 N.C. App. 239, 243 S.E. 2d 436 (1978).

Various witnesses testified as to the existence of certain trees which had been marked to indicate the location of the property boundary giving rise to the dispute in this case. Roy Ellison, a witness for the plaintiff, testified that he had once owned the disputed property and that there was a marked tree further up the line from the one used by the surveyors as a turning point. Joe Oliver, the plaintiffs' registered land surveyor, testified that: "If the white oak had been a white oak somewhere back up the line like Mr. Roy Ellison said, there would be no property in any of these surveys which would be on the west side of the road for [the plaintiffs'] property." In addition Oliver testified that, "It is possible that the oak tree is not this oak tree. If we use Mr. Ellison's oak tree, all the lines would either be in the present highway or to its east." All of the evidence indicated that the disputed parcel of land lies to the west of the present highway. Therefore, this evidence was sufficient to support a finding by the jury that the true boundary lies to the east of or in the highway and that the disputed parcel is, therefore, a part of the defendants' land to the west of the highway. The plaintiffs' motion for a directed verdict was properly denied.

For the reasons previously set forth, the judgment of the trial court is

Affirmed.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. GARY RAY MILLS

No. 7822SC640

(Filed 5 December 1978)

1. Criminal Law § 81—time of breathalyzer test—best evidence rule

Testimony by officers that a breathalyzer test was administered to defendant at 1:05 p.m. when the breathalyzer record indicated that the test was

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administered at 12:15 p.m. did not violate the best evidence rule since the contents of the writing were not in question, the time of the test was a fact which had an existence independent of the words on the writing, and the knowledge of the officers concerning this fact arose from their personal observations and experience rather than from the writing.

2. Criminal Law § 130— conversation between breathalyzer operator and juror—denial of mistrial

In a prosecution for driving under the influence of intoxicants, the trial court did not err in denying defendant's motion for mistrial made on the ground that the breathalyzer operator had talked to one of the jurors during a recess where the court conducted a hearing and determined that the conversation concerned the association of the breathalyzer operator and juror with a softball team some five years earlier, that the case was not discussed and that the conversation would not influence the juror.

3. Criminal Law § 101.2— article in jury view not introduced in evidence—no denial of fair trial

In a prosecution for driving under the influence in which there was evidence that defendant removed a brown paper bag from his car after it was involved in a collision and placed it in another vehicle, defendant was not denied a fair trial by the court's denial of his motion to have a brown paper bag which was not introduced into evidence removed from the jury view during his trial since the existence of the bag was not an essential link in the State's case, the bag was not itself capable of arousing prejudice among members of the jury, the jury was not informed of the actual contents of the bag, and the court was never called upon to rule on its admissibility.

4. Automobiles § 126; Criminal Law § 96— driving under the influence—statements by defendant's uncle—withdrawal of evidence

In a prosecution for driving under the influence, any prejudice resulting from an officer's testimony that defendant's uncle denied ownership and knowledge of a brown paper bag placed in the uncle's car by defendant after defendant's car was involved in a collision was removed by the court's prompt instruction to the jury to disregard such testimony.

5. Criminal Law § 163— objections to review of evidence

Objections to the trial court's review of the evidence must be made before the jury retires in order that the trial court may have an opportunity for correction or they are deemed waived and will not be considered on appeal.

APPEAL by defendant from *Mills, Judge*. Judgment entered 7 February 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals sitting in Winston-Salem 15 November 1978.

The defendant was charged with driving under the influence of intoxicating liquor. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing

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him to imprisonment for a term of six months, suspended on the condition that he pay a fine of \$125 plus costs of court, surrender his operator's license and not drive until he is properly licensed, the defendant appealed.

The State's evidence tended to show that on 8 December 1977 the defendant was operating a motor vehicle which was involved in a collision with another vehicle. A policeman who arrived at the scene shortly after the accident indicated that the defendant had a strong odor of alcohol about his breath, was unsteady on his feet, was speaking in a slurred manner and was using loud and abrasive language. In addition, the defendant removed a brown paper bag from his car and placed it in another vehicle belonging to his uncle. The defendant was then arrested and taken to the police station. After the defendant had been advised of his rights, the policeman questioned him. The defendant told the officer that during the past three hours he had been drinking a pint of gin and that he was under the influence of alcoholic beverages at the time of questioning. The defendant was then given a breathalyzer test. The results of that test showed that the defendant had .19 percent of alcohol to blood by weight.

The defendant elected not to present evidence.

Additional facts pertinent to this opinion are hereinafter set forth.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

C. Gary Triggs for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission of the testimony of two officers that the breathalyzer was administered to the defendant at 1:05 p.m. when the written breathalyzer record indicated that it was administered at 12:15 p.m. The defendant contends that this violated the best evidence rule. We do not agree.

The best evidence rule indicates that a writing is the best evidence of its contents. The rule does not apply "to writings

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when their contents are not in question or when they are only 'collateral' to the issues in the case." 2 Stansbury, N.C. Evidence (Brandis Rev. 1973) § 190, p. 100. Additionally, "if a fact has an existence independent of the terms of any writing, the best evidence rule does not prevent proof of such fact by the oral testimony of a witness having knowledge of [that fact]." 2 Stansbury, N.C. Evidence (Brandis Rev. 1973) § 191, n. 24, p. 103.

In the present case, the contents of a writing are not in question. The original breathalyzer record was introduced into evidence, and it is undisputed that it indicated the test was administered at 12:15 p.m. The time at which the breathalyzer test was given was a fact which had an existence independent of the words on the record. The knowledge of the officers concerning this fact arose from their personal observations and experiences rather than from the writing. In such cases, the best evidence rule does not apply. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

[2] The defendant next assigns as error the trial court's denial of his motion for a mistrial. The motion was made when it was learned that the breathalyzer operator had talked to one of the jurors during a recess. A hearing was then conducted concerning the incident, and both the State and the defendant examined the breathalyzer operator concerning the conversation with the juror. The trial court found that a conversation had taken place, that it concerned the association of the two with a softball team some five years earlier, that the case was not discussed and that the conversation would not influence the juror. The trial court then denied the defendant's motion for a mistrial.

A motion for mistrial should be granted when an occurrence during the trial results "in substantial and irreparable prejudice to the defendant's case." G.S. 15A-1061. The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. *State v. Sneed*, 274 N.C. 498, 164 S.E. 2d 190 (1968). Although the conversation between the breathalyzer operator and the juror was improper and should not have occurred, there has been no showing that the trial court abused its

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discretion or that the conversation had a prejudicial effect on the outcome of the case. See *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978). This assignment of error is overruled.

[3] The defendant also assigns as error the failure of the trial court to grant his motion to have a bag removed from the view of the jury during his trial. The bag, which apparently was a brown paper bag, was never introduced into evidence. The defendant contends, however, that its presence in the courtroom was prejudicial to him. We do not agree.

A brown paper bag is not in and of itself capable of arousing prejudice among the members of a jury. The existence of a bag was not an essential link in the development of the State's case. Nothing in the record tends to indicate that the jury was informed of the actual contents of the bag in the courtroom or that the trial court was ever called upon to rule on the issue of its admissibility in evidence. The denial of the motion did not prevent the defendant from receiving a fair trial. See *State v. Carter*, 17 N.C. App. 234, 193 S.E. 2d 281 (1972), *cert. denied*, 283 N.C. 107, 194 S.E. 2d 634 (1973).

[4] The defendant additionally assigns as error the failure of the trial court to grant his motion for a mistrial after the arresting officer testified as to statements made by the defendant's uncle. The arresting officer indicated that, when he went to the vehicle of the defendant's uncle and removed the paper bag the defendant had placed there, the defendant's uncle said, "It's not mine. I don't know nothing about it." The defendant objected to the statement and the objection was sustained. The jury was then instructed to disregard what they had heard concerning this matter. Since any prejudicial effect of the statement was overcome by the prompt instruction of the trial court, the motion for mistrial was properly denied.

[5] The defendant further contends that the trial court failed to impartially set forth the evidence in its charge to the jury. The trial court was required to state the evidence to the extent necessary to explain the application of the law to the evidence. G.S. 15A-1232. Due process requires that the evidence be reviewed in a fair and impartial manner. However, objections to the trial court's review of the evidence must be made before the jury retires in order that the trial court may have an opportunity for

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correction. If such objections are not timely made, they are deemed to have been waived and will not be considered on appeal. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). Nevertheless, we have reviewed the charge in its entirety and find no reversible error.

The defendant presented other assignments of error which we have reviewed and find to be without merit.

The defendant received a fair trial free from prejudicial error, and we find

No error.

Judges CLARK and WEBB concur.

IN THE MATTER OF: THE ESTATE OF JAMES CRAWFORD MCCOY,
DECEASED

No. 7730SC1053

(Filed 5 December 1978)

Executors and Administrators § 30; Taxation § 27— holding corporation dissolved—assets in hands of receiver—estate taxes—contribution from receiver

Where a consent judgment was entered into by all the parties and all the heirs of decedent which provided for the appointment of a receiver of the assets of a holding corporation, the stock of which decedent's heirs had claimed he owned at the time of his death, and, according to the consent judgment the corporation was to be dissolved and the assets distributed to the heirs according to fixed percentages which differed from the shares the heirs would be entitled to receive under the Intestate Succession Act, the trial court properly determined that the consent judgment did not address itself to the issue of tax liability of the parties and therefore did not preclude the administrator from seeking contribution from the receiver to pay estate taxes assessed against the estate; the administrator was entitled to receive sufficient funds from the receiver to pay the taxes assessed against the estate which were attributable to the inclusion of the corporate assets in the taxable estate; the parties should be taxed according to the share each heir was entitled to under the N.C. Intestate Succession Act and not according to the share each heir received under the consent judgment since the judgment did not address the issue of apportionment of estate tax liability; and the receiver should pay the taxes and those appellants claiming that they were owners of all or part of the assets of the corporation at the time of decedent's death should sue for a refund.

In re McCoy

APPEAL by defendants from *Thornburg, Judge*. Judgment entered 11 July 1977 in Superior Court, MACON County. Heard in the Court of Appeals 26 September 1978.

On 7 January 1973, James Crawford McCoy died intestate and on 2 April 1973, the appellant Jack A. Crawford and the appellee R. S. Jones, Jr., were duly appointed as co-administrators of the Estate of James Crawford McCoy.

On 21 January 1974, the heirs of James Crawford McCoy filed a petition for interpleader and declaratory relief to establish the ownership of the Ada McCoy Holding Corporation. The heirs claimed that James Crawford McCoy owned all the corporate stock at his death and that, therefore, the stock should be distributed by intestate succession. Jack A. Crawford and Pauline Van Hook, appellants, contended that McCoy had given them through various gifts and transfers, and that they owned all of the corporate stock since March, 1968.

Jack A. Crawford was removed as co-administrator of the Estate in 1974. On 13 December 1974, R. S. Jones, Jr. filed an answer and counterclaim requesting that the appellants release all corporate stock and assets to the administrator. On 1 April 1975, two orders were entered which realigned R. S. Jones, Jr., Administrator of the Estate of James Crawford McCoy, as party plaintiff in the action, and aligned the Ada McCoy Holding Corporation as a party defendant.

On 10 December 1975, a Consent Judgment was entered into by all the parties and all the heirs of James Crawford McCoy. This Consent Judgment provided for the appointment of a receiver of the assets of the corporation. The corporation was to be dissolved and the assets distributed to the heirs according to fixed percentages which differed from the shares the heirs would be entitled to receive under the North Carolina Intestate Succession Act.

On 20 June 1977 the Administrator of the Estate of James Crawford McCoy petitioned the court to direct the receiver of the Ada McCoy Holding Corporation to pay 70.87% of the death taxes levied upon the Estate, together with all interest and late penalties. On 11 July 1977, the court ordered the Receiver of the Corporation to pay 70.87% of the taxes assessed against the Estate. The court found that the total tax assessed against the

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Estate amounted to \$256,101.20. Judge Thornburg, who also entered the Consent Judgment order, held that the Consent Judgment did not address itself to the payment of death taxes which might be assessed against the Estate, and was therefore not binding on that issue. The court further noted that the appellants should file sworn affidavits with the Administrator to justify a claim for refund of death taxes based upon the theory that they were the owners of all or a part of the assets of the Ada McCoy Holding Corporation at the time of James Crawford McCoy's death.

From this order, appellants appeal.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis by Albert L. Sneed, Jr. for respondent appellants.

Siler & Philo by Robert F. Siler and Steven E. Philo for petitioner appellees.

CLARK, Judge.

The appellants first contend that the Consent Judgment resolved the question of whether or not the Administrator could recover funds from the Receiver to pay estate taxes assessed against the Estate. Appellants contend that, since the Administrator did not obtain the possession of or title to the corporate stock under the Consent Judgment, that the Administrator was barred from recovering any funds from the Receiver. We find no merit in appellants' contention. The Consent Judgment did not address itself to the issue of the tax liability of the parties. Therefore, the Consent Judgment does not preclude the Administrator from seeking contribution from the Receiver.

The appellants' second contention is that the payment of estate taxes is primarily a duty of the Administrator, and that the correct procedure for collecting taxes is for the Administrator to exhaust the funds in his possession, and then to recover the remainder from the assets in the hands of the distributees. *See*, I.R.C. §§ 2205 and 6324(a)(2); Treas. Reg. § 20-2002-1. These provisions apply only to those situations where the assets of the estate have already been distributed to the heirs. *See, First National Bank v. Wells*, 267 N.C. 276, 148 S.E. 2d 119 (1966). The purpose of the provision is to assure that "the tax shall be paid out of the

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estate before its distribution," and that if it must be collected after distribution, "the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution. . . ." 267 N.C. at 283-284, 148 S.E. 2d at 124. These statutory provisions are inapplicable here since the Receiver is not a distributee of the Estate. The Receiver is a fiduciary, appointed to dissolve the corporation and authorized to distribute the assets to the heirs in the proportions set out in the Consent Judgment. *See*, I.R.C. §§ 7701(a)(6), and 6901-03. In *Wachovia Bank & Trust Co. v. Maxwell, Comr.*, 221 N.C. 528, 20 S.E. 2d 840 (1942), proceeds of a life insurance policy were placed into a trust at the death of the insured. The wife, who was the sole owner and beneficiary of the policy, contended that the proceeds were not properly included in the Estate. It was held that the Administrator was entitled to recover funds from the trustee in order to pay the taxes assessed against the Estate as a result of the inclusion in the gross estate of the proceeds of the life insurance policy and that the beneficiary's remedy was to request that the trustee protest the payment of taxes and bring an action for a refund. The position of the Receiver in this case is analogous to the trustee in *Maxwell*. He is a fiduciary who is empowered to liquidate the corporate assets of the Ada McCoy Holding Corporation and to distribute its assets to the heirs of McCoy.

We hold that the Administrator is entitled to receive sufficient funds from the Receiver to pay the taxes assessed against the Estate of James Crawford McCoy which are attributable to the inclusion of the corporate assets in the taxable estate. *See*, I.R.C. § 6901-03.

Nor do we find merit in appellants' contention that the tax liability should not be assessed according to the shares each heir would receive under the North Carolina Intestate Succession Act, G.S. 29-1 *et seq.*, as ordered by Judge Thornburg. Under the Act, each heir was entitled to receive 12% of the estate. *See*, G.S. 29-15. The burden of paying taxes arose as a result of their being the heirs of James Crawford McCoy. In *Pulliam v. Thrash*, 245 N.C. 636, 97 S.E. 2d 253 (1957), the court held that tax liability must be assessed according to the shares that the devisees took under the will, and not according to the shares the parties received under a family settlement agreement, unless the agreement specifically provided otherwise. The same rule applies here.

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The parties are to be taxed according to the share each heir is entitled to receive under the North Carolina Intestate Succession Act and not according to the share each heir received under the Consent Judgment. Since the Consent Judgment did not address the issue of apportionment of estate tax liability, it does not alter the tax liability of the parties. *See*, Note, Taxation—Effect of North Carolina Inheritance Tax on a Will Compromise Agreement, 36 N.C.L. Rev. 236 (1958). For a general discussion of the effect of a will compromise agreement on estate or inheritance taxes, *see*, Annot., 36 A.L.R. 2d 917 (1954).

Appellants' fourth contention is that Pauline Van Hook clearly owned 10 shares of stock by virtue of a judgment entered against the decedent in McDowell County in 1957, and that each of the directors was required to hold one share of stock in the Ada McCoy Holding Corporation, and that they therefore owned one share apiece prior to the death of McCoy. The order entered by Judge Thornburg, however, properly concluded that the Receiver must pay the taxes, and appellants' remedy is to sue for a refund. *See*, Wachovia Bank & Trust Co., *supra*. Judge Thornburg ordered the Administrator to sue for a refund of taxes if the appellants supplied him with sworn affidavits claiming prior ownership of stock in the Ada McCoy Holding Corporation. We find no merit in appellants' contention.

Affirmed.

Chief Judge BROCK and Judge MARTIN (Harry C.) concur.

W. O. GREEN v. DEWEY E. LYBRAND

No. 7812DC72

(Filed 5 December 1978)

1. Landlord and Tenant §§ 18, 20— action to recover possession for nonpayment of rent—claims for money damages—tender of rent and costs

The trial court properly found that plaintiff's first claim for relief was to recover possession of demised premises upon a forfeiture for nonpayment of rent and that plaintiff's other claims were for money damages for negligent damage to the leased building, pollution of the premises with trash and debris,

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and negligent failure to repair plaintiff's equipment on the premises. Therefore, the court properly dismissed the claim for repossession for nonpayment where defendant tendered all rent due and all costs incurred by depositing the money with the clerk of court pursuant to G.S. 42-33.

2. Landlord and Tenant § 18— tender of rent—applicability of statute

G.S. 42-33 applies not just to summary ejectment actions but to "any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent."

3. Attorneys at Law § 7.4; Landlord and Tenant § 18— action for possession for nonpayment of rent—no attorney fees under lease

An action to recover possession of demised premises upon a forfeiture for nonpayment of rent was not an action "for the collection of any monies due" under the lease within the meaning of a lease provision relating to the recovery of attorney fees where rent through October 1976 was accepted by plaintiff, and rent for the months since October was tendered to plaintiff but refused on the ground that the lease was terminated in October; nor was it an action "to enforce the provisions of the Lease" within the meaning of the provision relating to attorney fees where the lease did not provide for termination in the event of default or breach.

APPEAL by plaintiff from *Guy, Judge*. Judgment entered 10 October 1977 in District Court, CUMBERLAND County. Heard in the Court of Appeals 23 October 1978.

Plaintiff brought this action to recover possession of premises leased to defendant, and for damages. He alleged late payment of rent, negligent damage to the building, pollution of the premises, and negligent failure to repair plaintiff's equipment on the premises. Defendant filed a motion in limine for a stay of further proceedings, on the ground that he had tendered all rent due and court costs pursuant to G.S. 42-33. The court made findings of fact, granted defendant's motion, and dismissed the matter without prejudice to plaintiff's right to proceed for damages in a separate action. Defendant was taxed with costs of the action. Plaintiff appeals.

Seavy A. Carroll for plaintiff appellant.

Marland C. Reid for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff urges that the proceedings should not have been dismissed because he was not seeking repossession of the

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premises solely on the basis of nonpayment of rent. Plaintiff's complaint is set out in essence as follows:

First Claim for Relief: The lease provided that the rent was payable in advance on or before the first day of each month; the rent for the third month was not paid by the seventh of the month; the October rent check was tendered on the 12th of the month; and on 16 October "the plaintiff . . . notified the defendant . . . that the defendant's lease was terminated due to failure of the defendant to pay the rent on or before the first day of the month on a number of occasions."

Second Claim for Relief: That the leased building was damaged due to defendant's negligence and defendant had failed to repair it as the lease required; and "[t]hat the continuation of the use of the building without its being repaired by the defendant is a breach of the terms of the contract by the defendant. . . . The building has been damaged in the amount of \$150.00, due to these specific damages."

Third Claim for Relief: That defendant allowed trash to accumulate on the premises, resulting in a reduction in value of the premises; this was "a violation of the spirit and letter of the contract, resulting in damage to the plaintiff."

Fourth Claim for Relief: That defendant used a piece of plaintiff's equipment included in the lease without having it repaired, which resulted in damage to the equipment.

The relief prayed for included: that defendant vacate the premises; that he pay the agreed rent for each month he continues in possession; and that he be required to pay "\$3,000 for damages to the bathroom, the wall of the building and the pollution of the premises with trash and debris."

In its order dismissing the action, the trial court found as fact: "That plaintiff's action is brought to recover possession of demised premises upon a forfeiture for the nonpayment of rent under a written lease agreement as alleged in the plaintiff's First Claim for Relief; [and] that the plaintiff's Second, Third and Fourth Claims for Relief are for money damages. . . ." The trial court's findings of fact are conclusive on appeal if supported by any competent evidence. *McMichael v. Borough Motors, Inc.*, 14

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N.C. App. 441, 188 S.E. 2d 721 (1972); 1 Strong's N.C. Index 3d, Appeal & Error § 57.2. Here the wording of the complaint clearly supports the court's findings. Moreover, even had it been found that plaintiff was seeking repossession on the basis of the other alleged contract breaches, the plaintiff could not have prevailed. "[A] breach of the conditions of a lease between a landlord and tenant cannot be made the basis of summary ejectment unless the lease itself provides for termination of [sic] such breach or reserves the right of re-entry for such breach." *Morris v. Austraw*, 269 N.C. 218, 222, 152 S.E. 2d 155, 159 (1967).

Having determined that this is an action to repossess for nonpayment of rent, we conclude that the matter was properly dismissed. The lease is silent as to forfeiture for nonpayment of rent, and generally "[i]n the absence of a stipulation for a forfeiture, a lessee does not forfeit his term by the nonpayment of rent. . . ." 49 Am. Jur. 2d, Landlord and Tenant § 1020. This rule is changed by G.S. 42-3, which provides that where the parties have failed to write the forfeiture into their lease, "there shall be an implied forfeiture of the term upon failure to pay the rent within 10 days after a demand is made. . . ." However, in the situation before us G.S. 42-3 must be read in conjunction with G.S. 42-33. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925). G.S. 42-33 provides that if "in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment . . . , pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease." Here, the court found that the defendant tendered all rent due and all costs incurred by depositing the money with the Clerk of Court, and, according to G.S. 42-33, the action was properly dismissed. See *Hoover v. Crotts*, 232 N.C. 617, 61 S.E. 2d 705 (1950); *Coleman v. Carolina Theatres, Inc.*, 195 N.C. 607, 143 S.E. 7 (1928).

[2] We disagree with plaintiff's contention that G.S. 42-33 is inapplicable simply because it is included in the statutes under the general heading of summary ejectment. The wording of the statute makes clear that it applies not just to summary ejectment actions, but to "any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent." And this was the conclusion of our Supreme Court in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E. 2d 220 (1947).

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[3] The plaintiff also argues that the court should have awarded attorney's fees to him as the "prevailing party" pursuant to the lease agreement. The lease provides that "in the event it shall become necessary for either party to enforce the provisions of this Lease by legal action or employ attorneys for the collection of any monies due herein, then the prevailing party shall be entitled to recover its reasonable attorney's fees. . . ." We consider only whether the "First Claim for Relief" falls within this provision, since it is the only claim which has been finally adjudicated.

It appears from the complaint that rent through October 1976 was accepted by the plaintiff, and from the reply that rent for the months since October has been tendered to plaintiff but refused, on the ground that the lease was terminated in October. Clearly this claim is not an action "for the collection of any monies due" under the lease. Neither is it an action "to enforce the provisions of the Lease," since the lease does not provide for termination in the event of default or breach. We find that the plaintiff is not entitled by the lease agreement to collect attorney's fees.

We note that the trial court ordered that "all further proceedings" be stayed and the matter dismissed, without prejudice to the plaintiff's right to proceed in a separate action on the second, third and fourth claims for relief. We see no need to dismiss the entire action and require plaintiff to begin again in a separate proceeding. Accordingly, the order of the trial court is hereby modified to dismiss only the first claim for relief.

Modified and affirmed.

Judges MORRIS and ERWIN concur.

Woodward v. Pressley

EDWARD V. WOODWARD, SR. AND WIFE, SHIRLEY B. WOODWARD v.
HUBERT PRESSLEY AND WIFE, ALASKA PRESSLEY, AND DAVID J.
HAYNES, TRUSTEE

No. 7830SC154

(Filed 5 December 1978)

Fraud § 12—misrepresentation of profits of motel and cafeteria—sufficiency of evidence for jury

Plaintiff's evidence was sufficient for the jury on the issue of fraud by defendants in the sale of a motel and cafeteria to plaintiffs where it tended to show that, during negotiations for the sale, defendants presented to plaintiffs a profit and loss statement showing a net profit of over \$80,000 for 1973, defendants filed a federal income tax return for 1973 showing a profit for the motel and cafeteria of only \$9,143, and defendants had knowledge of the contents of the federal income tax return when they submitted the profit and loss statement to plaintiffs, notwithstanding defendants produced evidence that they had filed an amended federal income tax return for 1973 which showed the same profit as that shown in the profit and loss statement.

APPEAL by plaintiffs from *Griffin, Judge*. Judgment entered 19 September 1977 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 15 November 1978.

This is a civil action for damages and to restrain the foreclosure of a deed of trust, based on fraud in the sale of a motel and cafeteria. Plaintiffs' evidence tended to show that prior to their executing the contract of sale, defendants fraudulently presented to them a profit and loss statement (plaintiffs' Exhibit 3) showing a net profit of at least \$80,285.58 for the year 1973; defendants filed a Schedule C form (plaintiffs' Exhibit 7) with their 1973 federal income tax return, showing a net profit of \$9,143.55. In pretrial discovery, plaintiffs had secured a copy of the 1973 Schedule C form. During trial, plaintiffs called defendant Hubert Pressley as an adverse party witness. Pressley identified the Schedule C form and testified concerning it. Plaintiffs offered Exhibit 7 and defendants' objection thereto was sustained.

Defendants in their answer admitted the contract for the sale of the property by defendants to plaintiffs. Defendants admitted the consummation of the contract by delivery of deed, downpayment and execution and delivery of note and deed of trust for the balance of purchase price. Defendants admitted the delivery to plaintiffs of the profit and loss statement showing a net profit

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for 1973 of \$80,285.58. Defendants admitted the execution of plaintiffs' Exhibit 7. Defendants, in responding to discovery by plaintiffs, produced an amended Schedule C for their federal income taxes for 1973, showing a net profit of \$35,395.21. This amended schedule included, in addition to the figures for their motel and cafeteria, income and expenses for defendants' campground and laundromat. The campground and laundromat were not sold to plaintiffs.

Plaintiffs also produced evidence tending to show damages sustained by them.

At the close of plaintiffs' evidence, the court allowed defendants' motion for involuntary dismissal. Plaintiffs appeal.

Roberts, Cogburn & Williams, by Max O. Cogburn and James W. Williams, for plaintiff appellants.

Bennett, Kelly & Cagle, by Robert F. Orr, for defendant appellees.

MARTIN (Harry C.), Judge.

We hold the trial court erred in dismissing plaintiffs' action. Plaintiffs' evidence must be considered in the light most favorable to them. *Scott v. Darden*, 259 N.C. 167, 130 S.E. 2d 42 (1963). In passing on this assignment of error, evidence erroneously excluded is to be considered with other evidence offered by plaintiffs. *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964).

Plaintiffs must produce evidence tending to show all the essential elements of fraud.

While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E. 2d 494 (1974);
Whitehurst v. Insurance Co., 149 N.C. 273, 62 S.E. 1067 (1908).

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In their negotiation for the sale of the subject property, defendants submitted the profit and loss statement (plaintiffs' Exhibit 3) to plaintiffs. The representations therein were matters within the peculiar knowledge of defendants. Plaintiffs' evidence tends to show defendants had knowledge of the contents of the Schedule C form (plaintiffs' Exhibit 7) at and before they submitted the profit and loss statement (plaintiffs' Exhibit 3) to plaintiffs on 24 June 1974. The record does not disclose the date plaintiffs' Exhibit 7 was executed by defendants. Defendants were required to file their 1973 income tax return on or before 15 April 1974. Nothing in the record to the contrary, we may assume it was executed by defendants on or before 15 April 1974. Plaintiffs received the profit and loss statement (plaintiffs' Exhibit 3) by letter dated 24 June 1974. The contract of sale was executed 7 July 1974. The evidence is sufficient to raise a jury issue as to the falsity of the profit and loss statement (plaintiffs' Exhibit 3). This is true even considering the evidence of the amended Schedule C produced by defendants on cross-examination of Pressley. The difference in net profit as shown on Exhibit 3 and the amended Schedule C is \$44,890.37. This is a substantial difference. There is no evidence in the record as to the date the amended Schedule C was filed with the Internal Revenue Service. The defendant Hubert Pressley testified "the amended return was before they ever brought suit against me. I guess I found the amended return in 1975. I don't remember exactly when the amended tax returns were filed." Defendants knew plaintiffs were dissatisfied with the transaction at the close of the 1974 season. Plaintiffs instituted suit 7 October 1975. We note, with interest, that entries on defendants' amended Schedule C form (filed as an exhibit on appeal) as to the income from the cafeteria and the motel are identical to the penny with those entries on the profit and loss statement (plaintiffs' Exhibit 3) submitted to plaintiffs 24 June 1974. Plaintiffs relied upon the profit and loss statement (plaintiffs' Exhibit 3) to their damage.

Plaintiffs' evidence, considered under the above stated principles, makes a case for the twelve. Since there must be a new trial, we refrain from discussing plaintiffs' assignment of error as to the exclusion of their Exhibit 7. The same may not occur at the next trial. The judgment of involuntary dismissal was improvidently entered and is

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Reversed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. VANDORANCE TROLLA McQUEEN

No. 7821SC598

(Filed 5 December 1978)

Criminal Law § 48— defendant's silence at time of arrest—questions not impeaching—no error

The trial court did not err in allowing the district attorney to question defendant concerning his failure to make a statement at the time of his arrest and after he had been warned of his constitutional right to silence, since the district attorney's questions did not serve his apparent purpose of impeachment, but the questions and defendant's answers instead tended to corroborate defendant's testimony at trial concerning his whereabouts and activities at the time of the commission of the crime charged, and this was neither erroneous nor harmful to defendant.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 29 March 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals sitting in Winston-Salem 14 November 1978.

The defendant, Vandorance Trolla McQueen, was indicted for armed robbery and entered a plea of not guilty. The jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of forty years, the defendant appealed.

The State's evidence consisted of the testimony of W. K. Patterson, the arresting officer. Patterson testified that he arrested one Larry Richardson in connection with an investigation of an armed robbery occurring in Arby's Roast Beef Restaurant on 28 December 1977. Richardson voluntarily made a statement to Patterson indicating that he and the defendant had gone for a ride in Richardson's car on 28 December 1977 and had stopped on Knollwood Street near the Little General Store. The defendant got out there and left the car, but Richardson could not see where

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he went. The defendant soon returned to the car and told Richardson to "pull off easy." The defendant then pulled out a pistol and laid it on the seat of the car. They then returned to the defendant's house, where the defendant pulled out a lot of money and threw it on the bed saying, "I have got me some money now." The defendant gave Richardson approximately fifty dollars of the money and said, "Don't say anything about this to anyone."

The defendant's evidence consisted solely of his own testimony. He testified that he had been employed at Arby's Roast Beef on Knollwood Street for seven months during 1971. Richardson had come by his house on the day in question, but he never went riding with Richardson and had nothing to do with the armed robbery.

Attorney General Edmisten, by Assistant Attorney General Rudolph A. Ashton III and Associate Attorney John R. Wallace, for the State.

Billy D. Friende for the defendant appellant.

MITCHELL, Judge.

The defendant's sole assignment of error is that the trial court erred in allowing the district attorney to question him concerning his failure to make a statement at the time of his arrest and after he had been warned of his constitutional right to silence. During the cross-examination of the defendant by the district attorney, the following exchange took place:

Q. And when you were arrested, you were advised of your Miranda rights, were you not?

A. Yes.

Q. And chose to make no statement?

A. Did I make a statement?

Q. Um-Hum.

A. Hun-uh.

Q. Why not?

MR. FRIENDE: Objection, Your Honor.

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MR. COLE: He opened the door.

THE COURT: Overruled.

A. Because I hadn't did anything. He asked me to confess and I said, "Confess to what?" and he said, "Armed Robbery."

Q. You didn't make a statement to anything?

A. I told him I was at home with the flu that day. That is what I told Officer Patterson.

Q. Were you at home with the flu?

A. Yes, I was. I had stayed out of work.

When the defendant was arrested, he was advised of his *Miranda* rights. Although those rights contain no express assurance that a defendant's silence will not be used against him, such assurance is implied therein. Therefore, "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L.Ed. 2d 91, 98, 96 S.Ct. 2240, 2245 (1976).

The defendant's testimony that he stayed at home on the day of the armed robbery constituted an exculpatory statement in the form of an alibi. The district attorney sought to impeach the defendant's statement by showing that he did not give the same statement at the time he was arrested but, instead, chose to remain silent. Had the district attorney been successful in his attempt to use the defendant's silence at the time of his arrest, and after receiving the *Miranda* warnings, for purposes of impeaching the exculpatory statement rather than for purposes of challenging the defendant's testimony as to the content of his statement, the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States would have been violated. *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L.Ed. 2d 91, 98, 96 S.Ct. 2240, 2245 & n. 11 (1976). Such error would require reversal "unless the appellate court finds that it was harmless beyond a reasonable doubt." G.S. 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

In the present case, however, the district attorney's efforts to impeach by presenting evidence of the defendant's "prior

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silence" was manifestly unsuccessful. Although the defendant's original answer of "hun-uh" must be taken as an indication that he exercised his right to remain silent after being advised of his Miranda rights, he immediately thereafter testified that he had in fact made a statement and recited the contents of that statement. The defendant's testimony clearly indicated that he made a statement to the officer concerning his presence on the date of the armed robbery which in no way differed from his testimony at trial on that subject. The district attorney's questions did not, therefore, serve his apparent purposes of impeachment. Instead, the questions and the defendant's answers tended to corroborate the defendant's testimony at trial concerning his whereabouts and activities at the time of the commission of the crime charged. This was neither erroneous nor harmful to the defendant.

The defendant having received a fair trial free from prejudicial error, we find

No error.

Judges CLARK and WEBB concur.

EUTAW SHOPPING CENTER, INC. v. MARILYN E. GLENN, D/B/A MODERN BRIDAL SHOPPES

No. 7812SC153

(Filed 5 December 1978)

1. Landlord and Tenant § 19— abandonment of leased premises—action for rent—written notice not condition precedent

Written notice of nonpayment of rent as required under the terms of a lease was not a condition precedent to an action by the landlord against the tenant for rent based on the tenant's abandonment of the leased premises.

2. Landlord and Tenant § 19— action for rent—abandonment of premises—mitigation of damages—actual rent collected

In an action for rent against a lessee who had abandoned the leased premises, the trial court properly subtracted from the award of damages the actual rent collected by plaintiff from another tenant rather than the reasonable rental value of the premises.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 3 October 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 November 1978.

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Plaintiff leased the defendant one unit in its shopping center, the lease to be in effect through December 1979. Plaintiff alleges that on 31 July 1975 defendant abandoned the leased premises and has refused to pay the rent accruing for the remainder of the term. Defendant answered that plaintiff had accepted her surrender of the premises, and that a new store had opened there in January 1976.

Defendant moved for "Summary Judgment or dismissal" on the ground that plaintiff failed to allege that it had given defendant written notice of past due rent, as required by the lease agreement. In reply plaintiff tendered an affidavit of compliance with the lease provision and denied that such compliance was required.

No ruling on the motion appears, but the case proceeded to trial; the court found as fact that defendant abandoned the premises without justification, and paid no rent since, and that plaintiff had since received \$3,177.60 in rent from another tenant. The court concluded that defendant was liable for rental through the date of the judgment less the \$3,177.60, and rent for the remainder of the term "less the actual rental collected by the plaintiff in mitigation of damages." Defendant appeals.

Butler, High & Baer, by Keith L. Jarvis, for plaintiff appellee.

Downing, David, Vallery & Maxwell, by Edward J. David, for defendant appellant.

ARNOLD, Judge.

Defendant first argues that her motion "for Summary Judgment or dismissal" should have been granted. Summary judgment would clearly have been improper, since there were material areas of dispute in which the trial court made findings of fact. "If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." *Moore v. Galloway*, 35 N.C. App. 394, 397, 241 S.E. 2d 386, 387 (1978).

[1] Nor should the court have granted the motion to dismiss the action pursuant to G.S. 1A-1, Rule 12(b)(6). The complaint alleged that defendant "offered to surrender the leased premises to Plaintiff, abandoned the leased premises, . . . and refused to pay and

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still refuses to pay the rentals accruing. . . ." Defendant contends that it was necessary that the complaint allege plaintiff's compliance with paragraph 32(c) of the lease. Paragraph 32 sets out "Events of Default" which "shall constitute a breach of this Lease Agreement on the part of Tenant." Included among the events of default is subparagraph (c): "The failure of Tenant to pay any rent payable under this Lease Agreement and the continued failure to pay the same for ten (10) days or more after written notice of such failure of payment given to Tenant by Landlord." Defendant's view is that such written notice of nonpayment of rent is a condition precedent to a cause of action here.

We disagree. Our Supreme Court has made clear that a complaint should not be dismissed "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970). In the case before us the complaint does not allege mere nonpayment of rent, but abandonment, for which there is no condition precedent in the lease. Since it does not appear to a certainty that plaintiff was entitled to "no relief under any state of facts," dismissal would have been improper. See *Benton v. Weaver Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975).

Defendant also assigns as error the alleged failure of the trial judge to find that plaintiff made a bona fide and reasonable effort to mitigate damages. However, the judge found as fact

7. That the Plaintiff has received from Mrs. Romelia Rothrock the total sum of Three Thousand One Hundred Seventy Seven Dollars and Sixty Cents (\$3,177.60) as rental payments for the aforesaid leased premises, *in mitigation of its losses* since the Defendant abandoned the premises; (emphasis added).

[2] Defendant further contends that the trial judge erred in subtracting from the award of damages the "actual rental collected by the plaintiff in mitigation of damages" rather than the reasonable rental value. Defendant cites *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12 (1928), but this case directly contradicts her position. "[O]rdinarily the measure of damages for the wrongful breach of a rental contract and abandonment of the demised premises . . . is the difference, if any, between the rent reserved

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in the contract and the rent received from another letting. . . ." *Id.* at 276-77, 142 S.E. at 15. Nor is the case of *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E. 2d 549 (1954), on point, for the lease there provided that liquidated damages would be calculated by allowing defendants credit for the reasonable rental value. We find no merit in defendant's contention.

Affirmed.

Judges MORRIS and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. HOWARD HARTLEY AND SCOTTY LEWIS

No. 7824SC697

(Filed 5 December 1978)

1. Larceny § 4.1— larceny of tires—sufficiency of description in indictment

Indictments charging defendants with felonious larceny of "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, t & d/b/a the Avery County Recapping Service, Newland, N.C. . . . having a value of over \$200.00" contained a sufficient description of the property taken to meet constitutional standards.

2. Indictment and Warrant § 17.4; Larceny § 4.2— larceny of tires—ownership by partnership or corporation—no variance

In a prosecution for felonious larceny of tires where the State alleged and proved that the tires belonged to a partnership, but defendants showed by cross-examination of a witness that the business from which the tires were taken was a corporation, there was no variance, since defendants failed to produce evidence that the business was incorporated as of the time of the larceny.

3. Criminal Law § 163— review of evidence and contentions—failure to object—objection waived

Where defendants did not object to the review of the evidence or contentions of the parties before the jury retired to deliberate, defendants waived such objections.

APPEAL by defendants from *Smith (David I.)*, Judge. Judgments entered 13 April 1978 in Superior Court, AVERY County. Heard in the Court of Appeals 15 November 1978.

Defendants were charged with felonious larceny. Upon verdicts of guilty of misdemeanor larceny, judgment of imprisonment was entered on each defendant.

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The bills of indictment charged the defendants with larceny on 15 September 1977 of used automobile tires belonging to Jerry Phillips and Tom Phillips, trading and doing business as Avery County Recapping Service, Newland, N.C.

Evidence necessary for determination of the questions on appeal is set out below.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Johnson & Lyerly, by Kelly Johnson, for defendant appellants.

MARTIN (Harry C.), Judge.

[1] Defendants moved to quash the bills of indictment for failing to sufficiently identify the property taken. The bills describe the stolen property as "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, t & d/b/a the Avery County Recapping Service, Newland, N.C. . . . having a value of over \$200.00."

Every person charged with a crime has the right to be informed of the accusation against him. N.C. Const. art. I, § 23. This provision is to enable the defendant to have a fair and reasonable opportunity to prepare his defense, to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense and to enable the court, on conviction, to pronounce sentence according to law. *State v. Strickland*, 243 N.C. 100, 89 S.E. 2d 781 (1955). The property alleged to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features.

In *State v. Foster*, 10 N.C. App. 141, 177 S.E. 2d 756 (1970), the indictment alleged "automobile parts of the value of \$300.00 . . . of one Furches Motor Company." The Court held this description met constitutional standards. An indictment alleging "an undetermined amount of beer, food and money of the value of \$25.00 . . . of the said Evening Star Grill" was held sufficient. *State v. Mobley*, 9 N.C. App. 717, 177 S.E. 2d 344 (1970).

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The indictments under consideration name the property stolen as "tires"; the tires are described as to type, "automobile" tires; the tires are described as to condition, "used" automobile tires; the tires are described as to ownership; the tires are described as to location, "Newland, N.C."

We hold the indictments sufficient to meet the constitutional requirements and the standards of *State v. Strickland*, *supra*. Defendants' assignment of error is overruled.

[2] Defendants contend the charges should have been dismissed for a fatal variance between the allegations of ownership and the proof. The State alleged and produced evidence to show that on 15 September 1977 the tires belonged to the partnership. On cross-examination of Jerry Phillips, defendants established that the business was incorporated under the name of Avery County Recapping, Incorporated. The larceny occurred 15 September 1977. The trial was during the week of 10 April 1978. Defendants failed to produce evidence that the business was incorporated as of the time of the larceny, 15 September 1977. The evidence tends to show it was a partnership on that date. The evidence does not disclose a variance. The assignment of error is overruled.

[3] Last, defendants contend the court erred in giving unequal stress to the contentions of the State in the charge. The trial judge did not state any contentions of the parties. Failure to do so is not error. The trial judge did review the evidence of the State and the defendants. Defendants did not object to the review of the evidence or contentions of the parties before the jury retired to deliberate upon its verdicts. By failing to do so, defendants waived such objections and they will not be considered on appeal. *State v. Hewitt*, 295 N.C. 640, 247 S.E. 2d 886 (1978).

No error.

Judges MORRIS and ARNOLD concur.

State v. Curl and State v. Booth

STATE OF NORTH CAROLINA v. J. B. CURL

STATE OF NORTH CAROLINA v. ROGER DEAN BOOTH

No. 7813SC352

(Filed 5 December 1978)

Criminal Law § 113.6— joint trial—instructions—acquittal or conviction of both defendants

In a joint trial of two defendants for the same crimes, a charge which was susceptible to the construction that the jury should convict both defendants if it found one defendant guilty constituted reversible error.

APPEAL by defendants from *Smith (David I.)*, Judge. Judgment entered 15 December 1977 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 24 August 1978.

Each of the defendants was charged with the felonies of conspiracy to sell a controlled substance, to wit: phencyclidine, possession of phencyclidine with intent to sell, and sale of phencyclidine. The cases were consolidated for trial and each defendant was convicted on all charges. From prison sentences imposed, each defendant has appealed.

Attorney General Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

Ray H. Walton and Elva L. Jess, for defendant appellants.

WEBB, Judge.

The defendants' first assignment of error pertains to the charge. As to possession with intent to sell, the court charged as follows:

"Members of the jury, I charge that if you find from the evidence beyond a reasonable doubt that on or about June 13, 1977, J. B. Curl and Roger Booth knowingly possessed phencyclidine and intended to sell phencyclidine it would be your duty to return a verdict of guilty of possessing phencyclidine with intent to sell it. However, if you do not so find,

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or if you have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty."

The court gave similar instructions as to the conspiracy and sales charges.

We hold it was error for the court to so charge the jury. We believe this instruction did not make it sufficiently clear to the jury that they did not have to find both defendants guilty if they found one of them guilty. See *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970) and *State v. Lockamy*, 31 N.C. App. 713, 230 S.E. 2d 565 (1976). The State contends that the jury was instructed that the guilt of each defendant was an individual question by the following instruction:

"Members of the jury, each of the defendants is charged with three separate offenses, conspiracy to sell and deliver a controlled substance, possession with intent to sell and deliver a controlled substance and selling and delivering a controlled substance. To each one of those charges you will return a verdict of guilty or not guilty as to each defendant."

It is true that the court charged the jury that it would find each defendant guilty or not guilty as to each charge. We do not believe, however, this instruction makes it clear that if one of the defendants is found guilty the jury did not have to find the other defendant guilty.

The defendants have brought forward other assignments of error which we do not consider since they may not recur at a new trial.

New trial.

Judges MORRIS and HEDRICK concur.

State v. Stell

STATE OF NORTH CAROLINA v. NEWTON R. STELL III

No. 7810SC692

(Filed 5 December 1978)

1. Rape § 19— taking indecent liberties with minor—sufficiency of evidence

In a prosecution for taking indecent liberties with a child, evidence was sufficient to be submitted to the jury where it tended to show that defendant, a thirty-nine year old driver's education instructor, had a fifteen year old female student drive to a wooded area and park on a secluded dirt road where defendant then had intercourse with her.

2. Rape § 19— lewd or lascivious act not defined—no error

In a prosecution for taking indecent liberties with a child, the trial court did not err in failing to define "lewd or lascivious act" in its charge to the jury, since those were such ordinary words that the jury was presumed to understand them.

APPEAL by defendant from *Preston, Judge*. Judgment entered 11 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals on 14 November 1978.

Defendant was charged in a proper bill of indictment with taking indecent liberties with a child in violation of G.S. § 14-202.1. The defendant pleaded not guilty. The jury found defendant guilty as charged. From a judgment entered on the verdict imposing a sentence of ten years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

Kimzey, Smith & McMillan, by Stephen T. Smith, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. The State presented evidence tending to show the following:

Defendant was a driver's education instructor at West Millbrook Junior High School in Raleigh and Nanette Chavis, who was fifteen years old at the time, was one of his students. On 21 December 1977 at about 9:00 a.m., Nanette Chavis drove with the defendant to a wooded area outside Raleigh and parked on a

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secluded dirt road. The defendant then had sexual intercourse in the car with Nanette Chavis. At that time, the defendant was thirty-nine years old.

The defendant did not present any evidence.

We hold that, considered in the light most favorable to the State, there is ample competent evidence to warrant its submission to the jury and to support a verdict of guilty of the offense charged. This assignment of error has no merit.

[2] The defendant next contends the trial court erred by failing to define "lewd or lascivious act" in its charge to the jury. Defendant was charged with violating G.S. § 14-202.1, which provides:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years, or both.

Jurors are presumed to understand the ordinary words of the English language, even where such words define essential elements of a crime. *State v. Godwin*, 267 N.C. 216, 147 S.E. 2d 890 (1966); *State v. Thomas*, 28 N.C. App. 495, 221 S.E. 2d 749 (1976). We believe the words "lewd or lascivious act" are such ordinary words which the jury is presumed to understand. In *State v. Vehaun*, 34 N.C. App. 700, 703, 239 S.E. 2d 705, 708 (1977), *cert. denied*, 294 N.C. 445, 241 S.E. 2d 846 (1978), the court, in rejecting an argument that the term "lewd or lascivious act" was unconstitutionally vague, held that the statute "clearly referred to

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sexual conduct with a minor child and described with reasonable specificity the proscribed conduct." This assignment of error has no merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

NORMAN V. SWENSON, GEORGE C. SNYDER, FRANK O. SHERRILL, WILLIAM L. PENDER, JOHN R. PENDER, III, MARY ROGERS PENDER MURPHY, DORIS HARE WHITE, D. LACY KEESLER, S. DEWEY KEESLER, CARSON INSURANCE AGENCY, INC., A. H. KIMBALL, OLIVIA BROWN THOMAS, HELEN BROWN KIMBALL, NELL V. BATES, ROSE DUPREE, ANN DUPREE KING, PAUL B. BEATTY, ROBERT L. TAYLOR, STANLEY E. EDLUND, PATRICIA A. EDLUND, SHARON S. STANDIFER, VIRGINIA T. JOHNSON, FRANCES M. VINSON, MATTIE S. GARDNER, ROBERT R. RHYNE, BETTY F. RHYNE, JAMES M. GILFILLIN, JOHN W. POWELL, REBECCA P. PITTMAN, T. F. MORGAN, GRACE E. MORGAN, MARIE DOWD LATIMER, AND JOHN D. KING, DERIVATIVELY IN THE RIGHT OF ALL AMERICAN ASSURANCE COMPANY, PLAINTIFFS v. CHAREST D. THIBAUT, JR., THOMAS H. CLARK, BEN F. THOMPSON, JR., GEORGE C. WIEMER, JR., ROBERT E. WIEMER, HERMAN TAYLOR, JR., TRAVIS E. NICHOLS, LELIER J. LELEUX, W. W. HAWKINS, J. MALCOLM DUHE, CLIFFORD C. COMEAUX, JR., J. ALFRED BEGNAUD, EMERY J. BARES, PAUL G. BACKUS, AND RUSSELL E. WALTON, DEFENDANTS AND ALL AMERICAN ASSURANCE COMPANY, BENEFICIAL PARTY

No. 7826SC78

(Filed 19 December 1978)

1. Appearance § 1.1; Rules of Civil Procedure § 12— motion to disqualify attorneys—general appearance—waiver of jurisdiction defense

By filing motions to disqualify plaintiffs' attorneys before raising any jurisdictional defenses, defendants made a general appearance and waived their defense of lack of jurisdiction over the person. G.S. 1A-1, Rule 12; G.S. 1-75.7.

2. Constitutional Law § 24.7; Process § 9— domestic corporation—nonresident director—service of process—long-arm statute

Sufficient contacts existed between North Carolina and a nonresident director of a domestic corporation so as to render constitutional the exercise of

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long-arm jurisdiction over the nonresident director pursuant to G.S. 55-33 in a shareholders' derivative action based on alleged malfeasance in office by the director.

3. Corporations § 6— defense of business judgment—when unavailable

The defense of business judgment is not available to a corporation where a majority of its directors are implicated in the allegations of the suit, as it is a defense on the merits which may properly be interposed only by the directors and management of the corporation unless the corporation is a real defendant as to some meritorious issue in the suit.

4. Corporations § 6— stockholders' derivative action—defense by corporation

In a derivative action brought by minority shareholders to enforce rights or to seek redress accruing to the corporation, the corporation will be deemed for purposes of the litigation to be aligned as a party plaintiff, except to the extent that the corporation is an actual defendant as to an issue in the action, although for purposes of form it is designated as a nominal defendant. Accordingly, the corporation ordinarily may not defend itself against the derivative action on the merits but must limit its defenses, if any, to certain pretrial matters proper to it, and dismissal will lie against the corporation when it seeks to extend its defenses beyond those areas in which it may properly conduct them.

5. Corporations § 6— stockholders' derivative action—demand on board of directors—defendants as majority of board

Minority shareholders were not required to make a demand upon the board of directors of a corporation before bringing a derivative action against officers and directors of the corporation where they alleged that defendants constituted a majority of the board of directors at the time of the transactions complained of and at the time the derivative action was instituted. Furthermore, it appears from the complaint that plaintiffs did make demand upon the board of directors to obtain the action they desired and that this demand was overwhelmingly refused, and the failure of plaintiffs to be specific in alleging such demand as required by G.S. 55-55(b) does not require dismissal since they were not required to make any demand at all.

6. Corporations § 14; Parties § 1.2— action against directors—malfeasance—other parties to malfeasance not necessary parties

Where, in an action against directors of a corporation for malfeasance in office, the trial court struck from the complaint prayers for rescission of the transactions constituting the malfeasance, the other parties to those transactions will not be legally bound or affected by any decree or judgment rendered in the action against the directors and are not necessary parties thereto.

7. Corporations § 14— action against directors—malfeasance—allegations of damages

In an action against corporate directors for malfeasance in office, the allegations of damages were not speculative and uncertain but were sufficiently specific to give fair notice to defendants of the events and transactions involved.

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8. Corporations § 14; Insurance § 1; Abatement and Revival § 8— insurance company—shareholders' action against directors—pending rehabilitation proceeding

The superior court was not deprived of subject matter jurisdiction in a derivative action by shareholders of an insurance company against directors of the company because of the trial court's retention of the cause in a prior proceeding to rehabilitate the insurance company, since there was no identity of parties, subject matter and issues in the two actions.

9. Corporations § 14— stockholders' action against directors—defense of good faith business judgment

In a derivative action brought by shareholders of a corporation against directors of the corporation for malfeasance in office, the trial court properly refused to grant summary judgment for defendant directors on the ground that the action of a majority of the board of directors in declining to sue themselves and in deciding to resist the derivative action claims against them was a good faith business judgment made in the best interests of the corporation and its shareholders where the evidence before the court showed: (1) a group of the individual defendants constituted a majority of the board of directors at the time of the events complained of and presently constitutes a majority of the board; (2) the seven purportedly disinterested directors were nominated and elected by this group; (3) a litigation evaluation committee, consisting of three purportedly disinterested directors, was appointed by the board to assess potential claims the corporation might have against a number of individuals, including defendants, but this committee was only an advisory group and was not vested with the plenary powers of the full board; (4) the decision to resist the derivative action against defendant directors was made prior to the formation of the litigation evaluation committee; and (5) no independent judgment was at any time exercised by the litigation evaluation committee in regard to the derivative action claims.

10. Attorneys at Law § 10— power of court to discipline attorneys

The inherent power of a court to regulate and discipline attorneys practicing before it is co-equal and co-extensive with the statutory powers to discipline an attorney granted to the North Carolina State Bar.

11. Attorneys at Law § 10— disciplining of attorney by court—no exclusion of action by State Bar

Since the interests of a court and of the North Carolina State Bar in disciplining an attorney are not always identical, the action of a court in disciplining or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the State Bar.

12. Attorneys at Law § 10— power of court to discipline attorney—no limit by Code of Professional Responsibility

A court's inherent power to discipline an attorney is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the State Bar.

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13. Attorneys at Law §§ 3, 12; Corporations § 14— representation of insurance company in rehabilitation—subsequent representation of stockholders in derivative action—use of confidences—standing to object

A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing plaintiff minority shareholders of the company in a derivative action against the company's directors by Canon 4 of the Code of Professional Responsibility, which prohibits the improper use of confidences and secrets of a client, since the law firm's representation of the insurance company, whether actually or derivatively, has at all times been adverse to the interests of management and the directors and concurrent with the interests of the insurance company as a corporate entity and the interests of the minority shareholders. Furthermore, the defendant directors have no standing to assert the privilege under Canon 4, since the privilege must be asserted by the corporate client, and the corporation has no standing to assert the privilege in this derivative action since the corporation must be treated as a party plaintiff and may not assert the privilege against itself.

14. Attorneys at Law § 7.1— stockholders' derivative action—stock as fee—no improper interest in subject matter of litigation

A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation in violation of Canon 5 of the Code of Professional Responsibility.

15. Attorneys at Law § 12— representation of stockholders in derivative action—no improper solicitation of clients

A law firm did not improperly solicit clients to be plaintiffs in an action by minority stockholders of a corporation against directors of the corporation where several of the minority stockholders conferred with an attorney in the firm with reference to action to protect their interests in the corporation, one stockholder proposed to pay for legal services with shares of the corporate stock, the attorney indicated that representation of at least 50,000 shares would be needed to cover the anticipated expenses of litigation and to indicate sufficient representation of minority stockholder interest, the stockholders communicated with other minority stockholders, and suit was filed after one stockholder assured the attorney that he had received support from enough stockholders to constitute 50,000 shares.

16. Attorneys at Law § 3— motion to disqualify attorneys—assumption court disregarded incompetent evidence

Where the record does not indicate that the trial judge clearly relied on incompetent evidence in denying defendant's motion to disqualify plaintiff's counsel, the appellate court will assume that he disregarded any incompetent evidence in the record in reaching his conclusions.

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17. Corporations § 14— stockholders' action against directors—malfeasance—corporation's advancement of legal fees

The provisions of G.S. 55-30, governing transactions between interested directors and their corporations, did not prohibit a corporation's advancement of legal fees under G.S. 55-19(d) to a director being sued in a derivative action by minority shareholders for malfeasance in office.

18. Corporations § 14— action against director—corporation's advancement of legal fees—meaning of "undertaking" for repayment

The "undertaking" required by G.S. 55-19(d) for the repayment of legal fees advanced by a corporation to a director if the director is unsuccessful in his defense means only a written promise, not made under seal, given as security for the performance of some act as required in a legal proceeding.

APPEAL by plaintiffs from *Friday, Judge*. Order denying injunctive relief entered 30 June 1977 in Superior Court, MECKLENBURG County.

Appeal by defendants Thibaut, Comeaux, Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Begnaud, Bares, Walton, and Taylor from *Friday, Judge*. Order denying motions to dismiss for lack of personal jurisdiction entered 30 June 1977 in Superior Court, MECKLENBURG County.

Appeal by defendants All American Assurance Company, Thibaut, Comeaux, Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Begnaud, Bares, Backus, Walton, and Taylor from *Friday, Judge*. Order denying motions to disqualify plaintiffs' attorneys entered 30 June 1977 in Superior Court, MECKLENBURG County.

Appeal by defendants All American Assurance Company, Thibaut, Comeaux, Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Begnaud, Bares, Backus, and Walton from *Friday, Judge*. Order denying motions for dismissal pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure entered 2 July 1977 in Superior Court, MECKLENBURG County.

The four appeals were consolidated for oral argument and heard in the Court of Appeals 24 October 1978.

Defendant Robert E. Wiemer gave notice of appeal but has not perfected or filed any appeal. Defendant George C. Wiemer, Jr., did not give notice of appeal from any of the above-cited orders of Judge Friday.

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Cansler, Lockhart, Parker & Young, by Thomas A. Lockhart and Joe C. Young, for plaintiff appellants.

Helms, Mullis & Johnston, by E. Osborne Ayscue, Jr., for respondent appellees Thomas A. Lockhart and Joe C. Young.

Stern, Rendleman, Isaacson & Klepfer, by Robert O. Klepfer, Jr., and Arthur A. Vreeland, for defendant appellant All American Assurance Company.

Jordan, Wright, Nichols, Caffrey & Hill, by William D. Caffrey and G. Marlin Evans for defendant appellants Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Begnaud, Bares, Backus and Walton.

Bryant, Groves & Essex, by Alfred S. Bryant for defendant appellants Thibaut and Comeaux.

Sanford, Cannon, Adams & McCullough, by Robert W. Spearman and H. Hugh Stevens, Jr., for defendant appellant Herman Taylor.

MARTIN (Robert M.), Judge.

This is an action by thirty-three minority shareholders of All American Assurance Company (hereinafter "All American"), brought derivatively in the name of All American against the named defendants who are past and present officers and directors of All American.

All American is a North Carolina corporation with its registered office in Charlotte, North Carolina, and executive offices in Baton Rouge, Louisiana. It was formed as a corporate entity by the merger of All American Assurance Company (a Louisiana corporation) into Pyramid Life Insurance Company, a North Carolina corporation with headquarters in Charlotte, North Carolina. At the time of the several events complained of in this action, sixty-four percent (64%) of All American's capital stock was owned by Republic Securities Corporation, a Louisiana corporation. At the time of the several events complained of, there was substantial identity of ownership and control of both All American and Republic Securities Corporation.¹ All transactions complained of occurred after the merger in 1972 and before the placing of All American into involuntary rehabilitation in 1975.

1. The minutes of the annual shareholders meeting of All American held 25 April 1975 indicates the voting and ownership of All American stock:

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The complaint alleges numerous breaches of the fiduciary duty owed to All American by the defendants. The allegations of

<u>Name</u>	<u>Number of Shares</u>
Republic Securities Corporation	
Robert E. Wiemer, Secretary-Treasurer	1,017,819
First Louisiana Fund, Incorporated	
Robert E. Wiemer, President	3,813
Republic Group, Incorporated	
Robert E. Wiemer, Secretary-Treasurer	1,067
Republic Title Guaranty Company,	
Robert E. Wiemer, Secretary-Treasurer	3,000
All American Retirement Plan,	
Emery Bares, Trustee	5,800
Gary J. Anderson, C.L.U.	3,941
Paul G. Backus	469
Emery Bares, C.L.U.	469
J. Alfred Begnaud	3,897
Thomas H. Clark, C.L.U.	11,977
Clifford C. Comeaux, Jr., D.D.S.	2,569
J. Malcolm Duhe	590
W. W. Hawkins	4,799
Lelier J. Leleux	3,116
Travis E. Nichols	938
Charest D. Thibaut, Jr.	6,325
Ben F. Thompson, Jr., M.D.	1,000
Russell E. Walton, C.L.U.	478
George C. Wiemer, Jr.	500
Robert E. Wiemer	5,208

The shares listed above constitute approximately 68.4% of the total voting shares of All American. (Exhibits to the record on appeal, Vol. IV, pp. 225-226.)

The summary of common stock ownership of Republic Securities Corporation as of 15 September 1974 shows the following shareholders as owning the indicated percentages of Republic:

<u>NAME</u>	<u># OF SHARES</u>	<u>% OF TOTAL</u>
Gary J. Anderson	246,645.4	13.82
Charest D. Thibaut, Jr.	683,253.6	38.28
Thomas Clark	19,600	1.10
Robert E. Wiemer	69,600	3.90
George C. Wiemer	33,000	1.84
Ben F. Thompson	18,000	1.01
Travis E. Nichols	12,000	.67
Clifford C. Comeaux	85,667	4.80
Mrs. Clifford C. Comeaux	35,862	2.00
Clifford Charles Comeaux, Jr.	6,000	.34
First Williston Fund, Ltd. (owned by Anderson and Thibaut)	316,800	17.75

The listed shares represent 85.51% of the ownership of Republic Securities Corporation. (Exhibits to the record on appeal, Vol. V, p. 278.)

The minutes of the annual shareholders' meeting of All American Assurance Company held 25 April 1975 listed the following individuals as having been elected directors:

Gary J. Anderson, CLU	C. C. Comeaux, Jr., DDS	Charest D. Thibaut, Jr.
Paul G. Backus	J. Malcolm Duhe	B. F. Thompson, Jr., MD
Emery Bares, CLU	W. W. Hawkins	Russell E. Walton, CLU
J. Alfred Begnaud	Lelier J. Leleux	George C. Wiemer, Jr.
Redfield E. Bryan, Jr., MD	Travis E. Nichols	Robert E. Wiemer
Thomas H. Clark, CLU	Herman Taylor, Jr.	

(Exhibits to the record on appeal, Vol. IV, p. 227.)

The board of directors of Republic Securities Corporation as of 30 April 1975 consisted of:

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the plaintiffs,² if proved to be true, would establish a pattern of self-dealing and negligent acquiescence on the part of the defendants amounting to a "looting" of the assets belonging to solvent All American for the benefit of the essentially insolvent Republic Securities Corporation and for the benefit of certain other enterprises controlled in part or wholly by various of the named defendants.³

As a result of the mishandling of company finances by management and the Board of Directors of All American, All American was placed in involuntary rehabilitation by order of Judge Harry C. Martin 4 November 1975, pursuant to a petition

Charest Thibaut, Jr.
Gary J. Anderson, Jr.
Robert E. Wiemer
Ben F. Thompson

Travis Nichols
Emery Bares
Tom Clark

(Exhibits to the record on appeal, Vol. V, p. 258.)

Gary J. Anderson, who was President of both All American and Republic Securities Corporation and a shareholder of both corporations, was not made a party defendant to this action. The reasons for this will be discussed *infra*.

2. The details of the allegations are not germane to our consideration at this point. We will, however, summarize them briefly by way of illustration:

1) the purchase by All American in March of 1975 of 18,000 shares of common stock in the Bank of St. James and Trust Company, a Louisiana bank, at a price of \$40 per share at a time when the shares were not possibly worth more than \$20 per share. The St. James shares were purchased from a nominee of Republic Securities Corporation (whose relation to All American is detailed in note 1, *supra*) and the purchase was not ratified by any disinterested director.

2) the purchase in May of 1975 of 5,000 shares of common stock in the Bank of St. Charles and Trust Company, at prices ranging from \$51.75 to \$55.395 per share. The shares allegedly were purchased from a nominee of Republic Securities Corporation for the benefit of Republic and were virtually worthless at the time of purchase. This transaction was not approved by any disinterested director of All American.

3) All American issued various commitment letters to purchase shares of the Bank of St. Charles and Trust Company at \$60 per share. These letters were issued to one Remy Gross, a nominee of Republic Securities Corporation, and appear to have been intended to serve as guarantees for a \$1.5 million note made by Republic and upon which note several of the defendants were personally liable as guarantors. The St. Charles stock had no market value at this time. These transactions were not approved by any disinterested director of All American.

4) All American was caused to make loans to McIngvale Associates General Agency, Inc. (hereinafter "MAGA") totaling \$1.3 million at a time when certain of the defendants were pecuniarily interested in MAGA. The loan was secured only by a second mortgage on California property of doubtful value. These transactions were not approved by any disinterested directors.

5) All American was caused to make unsecured loans to Republic Securities Corporation at no interest totaling \$431,375 at a time when Republic was insolvent. These transactions were not approved by any disinterested director.

6) All American was caused to issue a commitment to the National Bank of Commerce, Dallas, Texas, for the purchase of \$2.25 million debentures of MAGA.

7) All American was caused to issue a commitment letter to the Louisiana National Bank for a secondary take-out of a March 1975 note of George C. McIngvale, Jr. in the principal amount of \$1,290,838.95.

The various loans, purchases and commitments enumerated total not less than \$9,349,375.00.

3. Thibaut and Anderson were pecuniarily interested in the Bank of St. Charles and Trust Company and the Bank of St. James and Trust Company. Defendants Thibaut and Herman Taylor and also Gary J. Anderson were pecuniarily interested in MAGA, Inc.

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of John R. Ingram, Commissioner of Insurance, filed in accordance with Article 17A of Chapter 58 of the North Carolina General Statutes and which alleged that All American was insolvent and that the future unrestricted operation of the company by the present management would be hazardous to the shareholders and policyholders of the company. The company was operated in rehabilitation under the supervision of the court, and two of the named defendants party to this action (Charest D. Thibaut, Jr. and Robert E. Wiemer) were removed as officers and directors of All American, as was Gary J. Anderson, former president of the company. Republic Securities Corporation unconditionally transferred its 1,011,610 shares of capital stock of All American (representing 65% of the outstanding shares) to the American Bank and Trust Company, which bank was foreclosing an indebtedness of Republic owed to American Bank & Trust. American Bank and Trust agreed to maintain All American's statutory capital and surplus at \$2.5 million through 31 December 1976. Consequently, All American was released from rehabilitation by order of Judge Martin (dated 7 May 1976 and filed 10 June 1976) under certain conditions as quoted below in pertinent part:

1. The Court [Judge Harry C. Martin] retains jurisdiction over all parties to this action for such further orders as may be necessary;

* * *

9. All American shall vigorously prosecute, pursue and defend all rights, claims and defenses available to it with regard to the causes and conditions leading to the necessity for All American going into rehabilitation as enumerated in the Court's Order of November 18, 1975, and All American shall report quarterly to the North Carolina Commissioner of Insurance and this Court on the status of these separate causes and conditions;

Plaintiffs allege that All American, by its present board of directors and management, has failed to comply with the conditions of paragraph 9 set out above. In support of this allegation the plaintiffs have adduced evidence tending to show that at the

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substitute annual shareholders' meeting of 20 October 1976 held in Baton Rouge, Louisiana, a resolution was introduced by minority shareholders calling upon the board of directors to make immediate demand upon the directors responsible for the various transactions which led to All American's being placed in involuntary rehabilitation, so as to require those directors to reimburse All American for any losses their actions had cost the company. This resolution was overwhelmingly defeated by the shareholders present (67,316 shares voting for; 1,274,769 against) with all of the present defendants voting their stock against the resolution.

The law firm of Cansler, Lockhart, Parker & Young (hereinafter "CLP&Y"), by its partners Thomas Ashe Lockhart and Joe C. Young (hereinafter "Lockhart" and "Young") had been retained 30 July 1975 by All American at the instigation of Gary J. Anderson, President of All American, to specially represent All American in the matters concerning compliance with North Carolina law. The North Carolina Department of Insurance was investigating All American at this time to see if the company was in compliance with the provisions of North Carolina law governing insurance companies. It appears from the record and Judge Friday found that Lockhart's role as counsel to All American was limited to the scope of the rehabilitation proceeding and the investigations that were necessary to secure the information required to bring All American back into compliance with North Carolina insurance laws. CLP&Y had been general counsel for Pyramid Insurance Company up to and through the merger with All American of Louisiana, but that relationship was terminated at the conclusion of the merger in 1972. Except for isolated items of work, CLP&Y was not employed again by All American until the action of the board of directors 30 July 1975. At the termination of rehabilitation, All American discharged CLP&Y as their attorneys, indicating that they would use local Louisiana counsel for the remainder of the post-rehabilitation business.

Several of the plaintiffs, including Norman Swenson, former president of Pyramid Insurance Company, conferred with CLP&Y July 14-15, 1976, in reference to any action they as minority shareholders might take to protect their interests, and Swenson employed CLP&Y on 16 July 1976 to represent him. One of the plaintiffs proposed to pay for legal services rendered by CLP&Y with shares of All American, which were at that time worth from

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\$.50 to \$1.00 per share. Lockhart indicated that representation of at least 50,000 shares would be needed to cover the anticipated expenses of the litigation then being considered and to indicate a sufficient representation of minority shareholder interests. Swenson and others of the plaintiffs proceeded to communicate with other minority shareholders in the area. Upon Swenson's assurance that he had received support from enough shareholders to constitute 50,000 shares, Lockhart filed suit to enjoin the annual shareholders' meeting. (This particular matter was before this court in *Swenson v. All American Assurance Co.*, 33 N.C. App. 458, 235 S.E. 2d 793 (1977).) Several of the plaintiffs, including Swenson, continued to communicate with minority shareholders, seeking proxies to take to the substitute annual shareholders' meeting held 20 October 1976. After the defeat of the resolution introduced by the minority shareholders as discussed above, plaintiffs filed this derivative action 30 December 1976 with All American as beneficial party.

Defendant Herman Taylor timely filed a motion for extension of time and then filed a motion to dismiss for lack of jurisdiction. Having thus preserved his right to contest jurisdiction, he proceeded to make discovery and interpose other motions and defenses appropriate to the action. All American filed motions to disqualify CLP&Y from representing the plaintiffs, to dismiss pursuant to various portions of Rule 12(b), North Carolina Rules of Civil Procedure, and to dismiss the action on the grounds of the business judgment rule. The other defendants filed motions to disqualify CLP&Y from representing the plaintiffs, followed by motions to dismiss for lack of jurisdiction and various motions to dismiss.

Plaintiffs filed a motion seeking to enjoin implementation of the action of the board of directors of All American authorizing advance payments of legal fees to the defendants who were then current members of the board. (Such authorization was made by the board at its meeting 3 February 1977, at which meeting it was initially decided that All American would "vigorously oppose and defend" the derivative action. Also at this meeting, and subsequent to the decision to resist the derivative action, the board appointed a committee of purportedly disinterested directors to be a "Litigation Evaluation Committee," whose function would be to assess the potential claims All American might have

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against several individuals, including the individuals constituting a majority of the present board of directors, and to report back to the full board with its advice so that the full board could take action as it deemed appropriate.)

Judge Friday entered several orders regulating discovery on the issues raised by the motions, and held hearings and received briefs from counsel. By orders dated 30 June 1977 and 2 July 1977, he denied all of the motions of all parties, striking from plaintiffs' complaint those portions of the prayer for relief that requested relief inconsistent with the scope and nature of the derivative action. From these orders of Judge Friday, all parties appeal as indicated initially, bringing forward a record of 852 pages accompanied by 978 pages of exhibits and 370 pages of briefs by counsel, addressing 569 assignments of error.

I

[1] Because jurisdiction over parties is a threshold inquiry of any litigation, we begin our consideration of the instant case with the contentions of the individual directors that the superior court has no jurisdiction over them. All of the individual defendants except Herman Taylor, Jr., filed motions to disqualify CLP&Y as attorneys for plaintiffs before raising any jurisdictional defenses, so we will look first at the claims of this group.

These defendants were served pursuant to G.S. 55-33, which makes nonresident directors of a domestic corporation subject to the jurisdiction of the courts of this State, by mailing copies of the summons naming each such director a defendant to the North Carolina Secretary of State, who is deemed to have been constituted process agent by such director when he accepted a directorship in a North Carolina corporation. Upon receipt of such copies of summons, the Secretary of State proceeds to effect service in like manner as provided for foreign corporations under G.S. 55-146. No deficiency of process or failure to comply with statutory procedure is asserted by any of the defendants; they contend, rather, that the long-arm jurisdiction of G.S. 55-33 is unconstitutional as applied to them. We do not reach, however, any constitutional questions in reference to these defendants, as we find that they have waived their jurisdictional defenses by making general appearances in the action prior to their asserting any jurisdictional deficiencies.

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G.S. 1-75.7 provides that courts of this State, having jurisdiction over the subject matter, may exercise jurisdiction over a person without serving a summons upon him if he enters a general appearance in the action. "[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *In re Blalock*, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951). For the purposes of G.S. 1-75.7, a motion for extension of time in which to plead or otherwise answer will not constitute a general appearance; however, if the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not. *See, e.g., In re Blalock, supra; Williams v. Cooper*, 222 N.C. 589, 24 S.E. 2d 484 (1943).

There is no counterpart to G.S. 1-75.7 in the Federal Rules of Civil Procedure; accordingly, were this action governed by the Federal Rules the individual defendants would not have waived their jurisdictional defenses merely by filing motions to disqualify plaintiffs' counsel. However, in North Carolina it is clear that Rule 12 of the Rules of Civil Procedure must be read in conjunction with G.S. 1-75.7. As the Court stated in *Simms v. Stores, Inc.*, 285 N.C. 145, 157, 203 S.E. 2d 769, 777 (1974),

Construing Rule 12 and G.S. 1-75.7 together, as obviously we must do since they are a part of the same enactment, *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 9 S.E. 2d 606 (1940), it is apparent that Rule 12 did not abolish the concept of the voluntary or general appearance. On the contrary, as repealed G.S. 1-134.1 had done when it was enacted in 1951, Rule 12 eliminated the special appearance and, in lieu thereof, gave a defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer even though a defendant makes a general appearance when he files an answer. 5 Am. Jur. 2d, *Appearance* §§ 14, 16 (1962). However, as heretofore pointed out, after a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert

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the defense that the court has no jurisdiction over his person either by motion or answer under Rule 12(b).

* * *

When the legislature used the term *general appearance* in G.S. 1-75.7, it used a term which had acquired a settled meaning through judicial construction, and that construction became a part of the law. In the absence of anything which clearly indicates a contrary intent, the legislature is presumed to have used the statutory term under consideration in its judicially established meaning. [Citations omitted.]

The motions made by the individual defendants (except Herman Taylor, Jr.) to disqualify the plaintiffs' counsel requested affirmative relief from the court and necessarily invoked the judgment of the court as to the issues raised. The jurisdictional defenses were not raised prior to the filing of these motions, and the motions were not grouped or joined with any jurisdictional motions.

Defendants have relied heavily upon *City of Durham v. Lyckan Development Corp.*, 26 N.C. App. 210, 215 S.E. 2d 814, cert. denied 288 N.C. 239, 217 S.E. 2d 678 (1975). We find, however, that their reliance is misplaced. In *Lyckan*, the City of Durham began a condemnation proceeding against property belonging to the development corporation. Funds were paid in to the Clerk of Superior Court for Durham County with a filing of the notice of taking. A purported service of process upon the president of the defendant corporation on 8 August 1972 was found by the trial court to have been invalid. The corporation filed answer asserting invalidity of service 20 August 1973; it had, however, on 23 August 1972 petitioned to withdraw the funds deposited with the clerk. Plaintiff had moved to strike the answer of defendant as not being timely filed. The trial court found that the corporation had not waived its defense in regard to invalid service of process by filing a petition for disbursement with the clerk, further that defendant's answer was timely filed, and denied plaintiff's motion to strike the answer. The prime concern in *Lyckan* was whether or not the answer would be stricken and plaintiff would have a default judgment, not whether the defendant was properly before the court. In fact, the defendant was arguing for the position that it *was* before the court. Unlike the

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instant case, the purported service of process was totally invalid for physical defects, not because of any alleged constitutional or statutory defects. The evidence showed that at the time the president of the corporation was purportedly served with process, he was not even *in* the county where service was sought to be made. The declaration of taking had been filed, and a memorandum of action would have appeared in the Durham County Registry of Deeds, which obviously could serve to provide the defendant with actual notice of the pendent proceeding, without subjecting it to the court's jurisdiction. G.S. 136-105, as it was in effect at the time of this action, provided that a named defendant in a complaint and declaration of taking could apply to the court for disbursement of money deposited in the court, as a credit against just compensation and without prejudice to further proceedings in the cause, and that "the judge *shall*, [emphasis supplied] unless there is a dispute as to title, order" such disbursement without notice of the hearing to the Board of Transportation (now Department of Transportation). Absent a dispute as to title, the application for disbursement was not even a discretionary matter with the trial court; the defendant was entitled to disbursement as a matter of law. Therefore, it appears on the facts that in *Lyckan*, the motion for disbursement was not necessarily made in response to service of process; neither does it appear that any demand upon the adjudicatory function of the court was made (as was most definitely made by the instant motions to disqualify counsel), so that such motion arguably would not constitute a general appearance. We therefore find *Lyckan* wholly distinguishable on its facts and inapplicable to this case; to the extent that its holding appears to offer any conflict with our holding today we limit *Lyckan* to its very special facts. Likewise, the opinion of this Court in *Smith v. Express Co.*, 34 N.C. App. 694, 239 S.E. 2d 614 (1977) is of no comfort to these defendants as it is clear in that case that jurisdictional objections were made first and at all times subsequent were preserved by the defendants, a fact pattern markedly dissimilar to the one before us. As this Court observed,

It seems to us that if, as here, a defendant promptly asserts his jurisdictional defense as his *first* step in the lawsuit, he has performed his duty in alerting the court and the other parties. His opponent can then attempt to correct

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the jurisdictional difficulty or assume the consequences of his failure to do so. *Id.* at p. 698, 239 S.E. 2d at 617.

Accordingly, we find that defendants Thibaut, Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Comeaux, Begnaud, Bares, Backus and Walton waived service of process by entering general appearances in this action by filing motions to disqualify plaintiffs' counsel, and their assignments of error on this question are overruled.

[2] The appeal of Herman Taylor, Jr., however, presents a completely different question. His first act in the cause was to contest jurisdiction and having timely done so, he thereafter proceeded to protect his other interests in the lawsuit. His appeal, therefore, places squarely before us the validity of the long-arm statute (G.S. 55-33) as applied to this defendant. Defendant Taylor was served process in the same manner as the other defendants, and he is not contesting the mechanical aspects of such service, but rather contends that it is violative of due process to subject him to the jurisdiction of the North Carolina courts since he lacks the minimum contacts with the State to enable any of its courts to exercise jurisdiction over his person. In support of his contentions, he relies heavily upon the case of *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S.Ct. 2569 (1977), arguing that this case makes the purported exercise of long-arm jurisdiction over him via G.S. 55-33 unconstitutional on its face.

In *Shaffer*, plaintiffs employed an arcane procedure apparently peculiar to Delaware whereby, in suing directors of a Delaware corporation with principal offices in Arizona, shares in the Delaware corporation belonging to the defendant directors were sequestered and jurisdiction was thence obtained *quasi in rem* over the owners of the shares. The United States Supreme Court held that jurisdiction obtained in this manner was violative of due process and was not consonant with the standards of fairness enunciated in *International Shoe v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 ALR 1057 (1945). We decline to accept defendant Taylor's contentions, although counsel have skillfully briefed and argued them; this is but the second post-*Shaffer* challenge to a long-arm statute to come before our Court, and we have given the question the substantial consideration that it merits.

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At the outset, we would enumerate the major factual distinctions which would justify our reaching a result different from that in *Shaffer* in the instant case:

1. The jurisdiction purportedly exercised by the Delaware courts over the fiduciary defendants in *Shaffer* was not derived from any relation the directors had with the corporation incorporated in the forum state; it was derived solely from the sequestration of shares of a corporation belonging to defendant shareholders which were found to be constructively present in the forum state for such purpose. This meant that *any* shareholder, not just a director-shareholder, could be made amenable to the jurisdiction of the Delaware courts by the *quasi in rem* proceeding. In the instant case, however, jurisdiction is derived by reason of the defendant's being a director of the domestic corporation; his interest as a shareholder or the constructive presence of his shares in North Carolina do not in any way form the basis for our court's jurisdiction.

2. Delaware had not, by its legislature, enacted any statute clearly designed to protect its interest in providing a forum for suits against fiduciaries of domestic corporations; North Carolina has done so.

3. The only act of the defendant directors in *Shaffer* upon which jurisdiction was predicated was the purchase of shares in a corporation domesticated in the forum state; jurisdiction in the instant case is predicated upon the acceptance of a fiduciary position in a domestic corporation by an individual when the laws of the state of incorporation unequivocally give notice that such fiduciary may be called upon to defend himself in a forum of that state.

We interpret *Shaffer* to stand for the proposition that all purported exercises of jurisdiction, whether *in rem*, *quasi in rem* or *in personam*, must be consistent with the Due Process Clause and be scrutinized and evaluated in light of the minimum contacts standard of *International Shoe*, *supra*. Accordingly, we turn to *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965) (in which our Supreme Court listed a number of factors which would be relevant to consideration of whether the "minimum contacts" and "fair play" mandated by *International Shoe* are present) and analyze the purported exercise of jurisdiction over Herman Tay-

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lor, Jr. under the appropriate legal principles. (We list these factors in the same order as the Court in *Byham*, but assign them different numbers to reflect our omission of those not pertinent to the case before us.)

(1) *The form of substituted service adopted by the forum state must give reasonable assurance that the notice to defendant will be actual.* There is no question that defendant Herman Taylor, Jr., received actual notice of the pendent litigation.

(2) *It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.* The defendant before us voluntarily accepted a directorship in a North Carolina domestic corporation, a fiduciary position which is possessed of both privileges and responsibilities under our State law.

(3) *Consideration should be given to any legitimate interest the state of the forum has in protecting its residents with respect to the activities and contacts of the non-resident.* North Carolina has, of course, an inherent regulatory interest in the activities of domestic corporations and their fiduciaries. This interest is heightened when, as in the case of insurance companies, public utilities or common carriers, the activity engaged in by the domestic corporation is one that is found to be so important to the public welfare that a significantly higher degree of statutory and administrative regulatory control is exercised by the state over the corporation. North Carolina additionally has a manifest interest in providing a forum for the settlement of disputes arising under her laws and to which her laws must apply. Were we to accept the contentions of the defendant, a corporation's management and directors would be free to avail themselves of the protection and facilities of our State and its laws, but could, merely by choice of location for corporate headquarters and residency of its directors, completely remove themselves from the jurisdiction of the North Carolina courts and place themselves beyond the reach of individual resident shareholder plaintiffs, leaving regulation and the interpretation of North Carolina law applicable to them in the hands of whatever forum the corporation's management and directors have chosen, which forum may or may not (under its choice of law principles) look to the applicable law and

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may or may not correctly interpret it. All American does not exist as a corporate entity but by virtue of the North Carolina business corporation laws; its directors, past and present, hold no office and possess no power over the corporation except by virtue of North Carolina law defining their duties and privileges. Defendant Taylor's ignorance of the domicile of All American, whether culpable or not, will assuredly not relieve him from any of the responsibilities placed upon him by North Carolina law, as the acceptance of a directorship in a corporation is an act which of itself should suggest duties and responsibilities to the corporation so served and would reasonably suggest to a prudent person that malfeasance would subject a director to liability in some forum. On the basis of ignorance serving to eradicate contact with a forum state, Louisiana would have no greater contact or claim to jurisdiction over the defendant than North Carolina, as he testified that he did not know where All American was incorporated.

(4) *Consideration should be given to the question whether the courts of the forum state are open to the non-resident to enforce obligations of residents of such state created by the activities and contacts of the non-resident.* The defendant may certainly sue in his own name in the North Carolina courts upon matters arising from his activity and contact with North Carolina. He could also, in his capacity as a director, have caused suit to be brought in North Carolina in the corporate name of All American to enforce obligations of North Carolina residents to the corporation. The courts of North Carolina have at all times been open to him if he needed or desired the use of them in the context of his role as director of a domestic corporation.

(5) *An estimate of the inconveniences which would result to the non-resident from a trial away from his home or principal place of business is relevant.* While the convenience of the forum to any or all parties may prove relevant, there is no requirement that inconvenience to a non-resident will of itself negate an attempted exercise of jurisdiction over that non-resident. There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a non-resident. *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 C. 2d 855, 860, 323 P. 2d 437, 440 (1942) as

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stated in *Byham v. House Corp.*, *supra*. It appears from the record that no greater inconvenience would accrue to defendant Taylor by having to defend this action in North Carolina than would accrue to the plaintiffs by having to prosecute the action in Louisiana, in a piece-meal fashion (since the other defendants are inescapably drawn into the North Carolina court's jurisdiction) and the trial judge apparently decided for the plaintiffs on this issue in light of the state's interest in providing a fair forum for her resident plaintiffs. We will not question his conclusion here.

(6) *Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state.* It is apparent from the record that much documentary evidence pertinent to this case and that a number of witnesses who would be called are located in Louisiana. This consideration obviously cuts in favor of Louisiana as a forum state.

(7) *When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the non-resident beyond the reach of the claimant. Whether this is the situation in a given case is pertinent.* In the case before us, no benefit from the suit will accrue directly to the shareholders. The corporation is the beneficial party, and the plaintiffs will realize benefit only to the extent their shares increase in value as a result of successful litigation culminating in successfully executed judgments against solvent defendants. The shares of All American were nearly worthless when this action was instituted. The litigation promised to be protracted and complex. Had the suit been instituted in a foreign jurisdiction, the cost of litigation could easily have exceeded the value of the shares represented by the plaintiffs. In such an event, the plaintiffs could not, as a matter of common sense, have been expected to maintain their action, and thus the defendants would have been out of reach for all practical purposes.

(8) *It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against non-residents.* North Carolina's legislature, by way of G.S. 1-75.4(8) and G.S. 55-33, has expressed a substantial interest in bringing non-resident directors before the North Carolina courts, and has given to the courts the fullest jurisdiction allowable under the Constitution. It was the failure of

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the Delaware legislature to make manifest such interest that the majority in *Shaffer* found so persuasive as to the non-existence of jurisdiction.

The majority opinion in *Shaffer* and Justice Brennan's partial dissent are both susceptible to an interpretation that a "consent" statute such as N.C. G.S. 55-33 would be valid on its face; however, it is not necessary that we consider the validity of the statute *per se* in question as we conclude from a consideration of the foregoing matters that sufficient contacts between North Carolina and Herman Taylor existed at the time of the events complained of to subject him validly to jurisdiction in the North Carolina courts under both *International Shoe* and *Shaffer*. Defendant's assignment of error is overruled.

Because of the result reached above, and for essentially the same reasons, we do not need to elaborately consider defendant's assignment of error pertaining to Judge Friday's findings that he voluntarily sought the protection of North Carolina law and concerning the convenience of the North Carolina courts as a forum. "The State does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Hanson v. Denckla*, 357 U.S. 235, 254, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958). (But see, Comment, *The Reasonableness Standard in State-Court Jurisdiction: Shaffer v. Heitner and the Uniform Minimum Contacts Theory*, 14 Wake Forest L. Rev. 51 (1978). As we have found that all of the individual defendants are properly before the court, in view of the various and potentially conflicting considerations, North Carolina is *one*, if not the only, convenient and just forum for the litigation. The assignments of error are overruled. (We have noted defendant's final assignment of error to the finding by Judge Friday that he had waived his initial jurisdictional defense by subsequently appearing generally and proceeding to prudently defend himself. This finding is in conflict with our holding in *Smith v. Express Co.*, 34 N.C. App. 694, 239 S.E. 2d 614 (1977), and we overrule the trial judge's finding, although it has no effect upon the case as we have decided it.)

The recent case of *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D.C. Kans. 1978) (opinion filed 17 October 1978) further supports our holding that the trial court's ex-

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ercise of jurisdiction over the non-resident directors was proper. It will also support the existence of jurisdiction in the North Carolina trial court over Republic Securities, Inc., should that at some point in trial on the merits become necessary. *Energy Reserves* involved the exercise of jurisdiction by a Federal District Court over the non-resident parent of a domestic corporation, even though the parent corporation had no physical contacts with the forum. The case contains an exhaustive analysis of the evolution of jurisdictional concepts to the standard enunciated by *International Shoe* and *Shaffer*, reaching the conclusion that actual or fictional physical presence in the forum state of the person or entity over whom long-arm jurisdiction is sought to be asserted is no longer a valid mode of analysis in the light of the two cases cited above. Rather, the question becomes whether the person or entity committed acts in the forum state either in person or through agents, which would justify the exercise of jurisdiction over that person in light of the "fairness" and "minimum contacts" tests. These are the tests and analysis we have employed to reach conclusions consonant with *Energy Reserves* and, we think, *Shaffer* and *International Shoe*.

II

A second threshold question must also be determined in this appeal: to what extent, if any, is a corporation entitled to defend itself against a derivative action when it is named as a party defendant? This is a question of first impression in North Carolina; we have found no precedent on point and it is indicated in *Robinson*, North Carolina Corp. Law § 14-8 (2d ed.) that there is none. Although the issue was not briefed or argued by counsel, we raise it *ex mero motu* as it confronts us squarely upon the face of the record and a just and equitable disposition of the appeal would be impossible without our considering it.

A corporation is, beyond question, a necessary party to any litigation brought derivatively in its name, *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967), and is customarily captioned a nominal defendant. However, as the action is brought in the right of the corporation and any recovery thereunder accrues to the benefit of the corporation and not to the nominal plaintiffs who bring the action derivatively, it is apparent that the interests of the corporation are not necessarily adverse to those of the

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plaintiffs and may be identical to them. The principle was well stated by Vice Chancellor Stein in *Solimine v. Hollander*, 129 N.J. Eq. 264, 19 A. 2d 344 (1941):

It is important to remember the true nature of a suit of this character. The stockholders, suing and intervening, do not prosecute the cause in their own right and for their own benefit but in the right of the corporation and for its benefit. While nominally the company is named as a defendant, actually and realistically it is the true complainant, for any avails realized from the litigation belong to it and it alone. The only circumstance under which the individual stockholder is permitted to bring the suit is either the refusal of those in control of the company to bring the proceeding or the fact that their relation to the subject of the complaint is such that demand upon those in control to bring the suit would be futile. Whatever be the circumstances furnishing license to the individual stockholder to bring a class action of this kind, the fact remains that when suit is brought, and determined on its merits the company must be treated in all respects . . . as any other complainant in the ordinary cause.

* * *

The rule that I gather from the cases is to the effect that where directors are charged with misconduct in office and are sought to be held accountable, the corporation is required to take and maintain a wholly neutral position, taking sides neither with the complainant nor with the defending director. 129 N.J. Eq. 266-267, 19 A. 2d 345-346.

Accord, *Slutzker v. Rieber*, 132 N.J. Eq. 412, 28 A. 2d 528 (Ch. 1942); *accord*, *International Brotherhood of Teamsters, Etc. v. Hoffa*, 242 F. Supp. 246 (1965); *accord*, *Meyers v. Smith*, 190 Minn. 157, 251 N.W. 20 (1933); *accord*, *Chaplin v. Selznick*, 182 Misc. 66, 58 N.Y.S. 2d 453 (1945); *accord*, *Barrett v. Southern Connecticut Gas Co.*, 172 Conn. 362, 374 A. 2d 1051 (1977). See also, generally, Note, Defenses in Shareholders' Derivative Suits—Who May Raise Them, 66 Harv. L. Rev. 342 (1952); 19 C.J.S. Corporations § 830; 13 Fletcher Cyclopedica, Corporations (Perm. Ed.) § 5939; *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed. 2d 729 (1970). The anomaly of a corporation, in whose name and right a

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derivative action is brought, being allowed to defend itself against itself is apparent. It is particularly apparent in the situation, such as is found in the instant case, where the alleged wrongdoers are in control of the corporation. Accordingly, the corporation All American should not be allowed to defend this action on its merits, and portions of All American's appeal will be dismissed for lack of standing, as hereinafter noted.

[3] This is not to say that in all cases and in all circumstances a corporation is powerless to resist a derivative action. In some situations, the corporation in whose interest the derivative action is purportedly brought will have interests adverse to those of the nominal plaintiffs bringing the action derivatively, and will of necessity be more than a nominal defendant. Such situations would include an action to enjoin the performance of a contract by the corporation, to appoint a receiver, to interfere with a corporate reorganization or to interfere with internal management where there is no allegation of fraud or bad faith. *See, National Bankers Life Insurance Company v. Adler*, 324 S.W. 2d 35 (1959) and the cases collected therein. Additionally, certain defenses which are properly asserted before trial on the merits of the action are peculiar to the corporation alone, and may be properly raised *only* by the nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant. These defenses would include the lack of standing of the plaintiffs to sue derivatively for reasons of insufficient representation of shareholders and a failure on plaintiffs' part to make a demand upon the board of directors. Other defenses, such as matters of personal jurisdiction, venue and subject matter jurisdiction (which question may arise in the context of alleged existence of prior pending actions involving matters identical to those complained of in the derivative suit) could be asserted by both corporations and individual defendants where appropriate, as they are not defenses on the merits of the derivative claim. The defense of business judgment, it is to be noted, is not available to the corporation where a majority of its directors are implicated in the allegations of the suit, as it is a defense on the merits which may properly be interposed only by the directors and management of the corporation, unless the corporation is a real defendant as to some meritorious issue in the suit. *Slutzker v. Rieber*, 132 N.J. Eq. 412, 28 A. 2d 528 (Ch. 1942).

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[4] For the foregoing reasons, we hold that in an action, brought by a minority shareholder derivatively in the name and right of a corporation, to enforce rights or to seek redress accruing to the corporation, that corporation will be deemed for purposes of the litigation to be aligned as a party plaintiff (except to the extent that the corporation is an actual defendant as to an issue in the action) although for purposes of form it is designated as a nominal defendant. Accordingly, the corporation, except as noted above, may not defend itself against the derivative action on the merits and must limit its defenses, if any, to the pretrial matters proper to it. Where a corporation seeks to extend its defenses beyond those areas in which it may properly conduct them, dismissal will lie against it. The effects that our holding will have on the instant case will be noted as we reach the issues where it is pertinent.

III

The individual defendants and All American filed several motions to dismiss this derivative action pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. The grounds stated were:

1. failure on the part of the plaintiffs to comply with the prerequisites for filing a derivative action as set out in G.S. 55-55(b).

2. all necessary parties were not before the court and joined in the action.

3. damages were not sufficiently alleged in the complaint and were speculative and uncertain.

4. there was a prior pending action between the same parties and involving the same issues as the instant derivative action.

We will treat these issues *seriatim*.

Plaintiffs in a derivative action are required by G.S. 55-55(b) to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort." This statutory provision codifies the prior case law of this and other jurisdictions where it has been held that in order for an individual as a shareholder to bring suit against the directors of a corporation for breaches of

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their duties to the corporation, he must show that he has exhausted his intracorporate remedies by making demand upon the board to do that which he seeks to have done. However, one equitable exception to the general rule has consistently been maintained by our courts: where the directors who are in control of the corporation are the same ones (or under the control of the same ones) as were initially responsible for the breaches of duty complained of, the demand of a shareholder upon directors to sue themselves or their principals would be futile, and as such is not required as a prerequisite for the maintenance of the action. This principle was enunciated in *Coble v. Beall*, 130 N.C. 533, 41 S.E. 793 (1902):

If the facts as alleged show that the defendants charged with a wrong doing, or some of them, constituted a majority of the directors or managing body at the time of commencing the suit, or that the directors or the majority thereof, are still under control of the wrong-doing defendants, so that a refusal of the managing body, if requested, to bring suit in the name of the corporation, may be informed with reasonable certainty, then an action by a stockholder may be maintained without alleging or proving any notice, request, demand or express refusal. *Id.* at p. 536, 41 S.E. 794.

Accord, *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 80 S.E. 2d 358 (1954), and the several cases pertinent cited thereunder.

[5] In the case before us, the complaint affirmatively alleges that defendants Thomas H. Clark, Ben F. Thompson, Jr., George C. Wiemer, Jr., Travis E. Nichols, Lelior J. Leleux, W. W. Hawkins, J. Malcolm Duhe, Jr., Alfred Begnaud, Emery J. Bares, Paul G. Backus and Russell E. Walton, constituting a numerical majority of All American's board of directors, were directors at the time of the transactions complained of and are still directors of All American. This, of itself, would relieve plaintiffs of any obligation to make demand upon the board, but would instead entitle them to state in their complaint the "reasons for . . . [their] . . . failure to obtain the action or for not making the effort." G.S. 55-55(b). It also appears, however, that plaintiffs did make demand upon the board of directors at the substitute 1976 annual shareholders meeting held 20 October 1976, and this demand was overwhelmingly refused. In view of the fact that they were not required to

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make any such demand at all, the failure to be specific in alleging such a demand would hardly be grounds for dismissal. This assignment of error by defendant All American is patently meritless and is overruled; as the individual defendants lack standing to assert this defense, their appeal as to the pertinent portion of Judge Friday's findings and order is dismissed.

[6] It is vigorously contended by the defendants that Remy Gross II, Gary J. Anderson, Republic Securities Corporation, National Bank of New Orleans, McIngvale Associates General Agency, Inc., George C. McIngvale, National Bank of Commerce of Dallas, Texas, and Louisiana National Bank⁴ are necessary parties to this action, as no decree or valid judgment may be rendered which will not affect their interests. They cite *Equitable Life Assurance Society of the United States v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390 (1951) in support of their contention, quoting from Justice Ervin's opinion as follows:

A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. *Id.* at p. 352, 67 S.E. 2d at 395.

We have no quarrel whatever with this statement of the law. Rule 19 of the North Carolina Rules of Civil Procedure has specifically adopted the prior case law of this jurisdiction concerning proper and necessary parties, rather than the federal rule classifications of "indispensable" and "conditionally necessary" parties. However, the present posture of the action moots any consideration of the question of necessary parties. The complaint originally prayed for rescission and cancellation of a number of allegedly illegal agreements and transactions.

Judge Friday properly concluded that if these transactions were to be voided, the parties to those transactions would have to be joined. *Tucker v. National Linen Service Corp.*, 200 F. 2d 858 (5th Cir. 1953); 3A J. Moore Federal Practice, ¶ 19.13(1) at p. 2379, note 15. It was also apparent that the courts of this state could not properly obtain jurisdiction over all of these parties.

4. All of these persons and entities have had some degree of relationship with All American with reference to the several transactions complained of by plaintiffs.

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Therefore Judge Friday, using the broad powers given him in Rule 21 of the North Carolina Rules of Civil Procedure and to the end of promoting justice, struck from the complaint the prayers for relief which exceeded the proper scope of the action and the court's jurisdiction, leaving only the causes of action against the defendant directors. The holding of *Mills Co. v. Earle*, 233 N.C. 74, 62 S.E. 2d 492 (1950), (which opinion was also written by Justice Ervin) stands for the proposition that a cause of action against corporate directors for malfeasance is distinct from a cause of action for rescission of the transactions constituting the malfeasance, and that there is no requirement for joinder of the parties to the transactions complained of if their rescission is not sought, as those parties would not be bound or affected in law by the action against the directors. If a complaint alleges facts which would constitute several causes of action but only one action is represented by the prayer for relief, the extraneous allegations may be viewed as surplusage and disregarded. *Heath v. Kirkman*, 240 N.C. 303, 82 S.E. 2d 104 (1954). Cf., *Snotherly v. Jennette*, 232 N.C. 605, 61 S.E. 2d 708 (1952). And, see, generally, Brandis & Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C. L. Rev. 405 (1956). As Rule 21 of the North Carolina Rules of Civil Procedure allows severance of any claim against any party, and a ruling on such severance lies within the discretion of the trial judge, absent a manifest abuse of discretion, the trial judge's ruling will not be disturbed. Defendants have failed to make any such showing. Accordingly, we find that the various parties sought by defendants to be joined would have been necessary parties to the action as originally pleaded, but in view of the severance of the claims against the directors from the other prayers for relief (which were dismissed without prejudice), joinder of these additional parties is not necessary, as they will not be legally bound or affected by any decree or judgment rendered in this proceeding. The action of Judge Friday denying dismissal on this ground is affirmed, and the assignments of error by defendants are overruled.

[7] The damages arising on the facts as pleaded are anything but speculative and uncertain. While the precise extent of all damages will only be made clear upon trial and after further discovery, the allegations of damage are sufficiently specific to give fair notice to the defendants of the events and transactions

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involved. Amendment of the complaint may be had where appropriate as additional evidence becomes available. This assignment of error is meritless and is overruled as to the individual defendants. The pleading of the damages is an issue which is central to the merits of the action, and in the instant case, does not constitute an area in which All American has standing to assert a defense. The appeal of the corporate defendant on this point accordingly is dismissed.

[8] Defendants contend that plaintiffs in this action should have intervened in the rehabilitation proceeding instituted prior to this action, and made motion in that cause to compel the board to act, rather than instituting another action. They contend that Judge Martin's retention of the cause in the prior rehabilitation proceeding deprives the court of subject matter jurisdiction in the instant case. That contention is meritless. The present action lacks the identity of parties, subject matter, issues involved and relief demanded, set forth as being essential for abatement of an action on grounds of a prior action pending in *Diamond Brand Canvas Products Co. v. Christy*, 262 N.C. 579, 138 S.E. 2d 218 (1964) and the cases cited thereunder. A protracted discussion here of the distinctions between the instant action and the prior rehabilitation proceeding would be fruitless. We find them to be obvious and dispositive. This assignment of error is overruled.

[9] Defendants also moved to dismiss this action on the grounds that the action of the majority of the board of directors in declining to sue themselves and in deciding to resist the derivative action claims brought against them was a good faith business judgment made in the best interests of All American and its shareholders. They cite a number of cases seeking to support their contention that the trial judge erred in failing to dismiss the action on this ground, notably *Auerbach v. Bennett*, Index No. 572/77, New York Supreme Court (Westchester County, 1977), which, it is argued, is completely dispositive of the issue and resolves all conflicts in defendants' favor. These contentions of the defendants have no basis in law or in fact. In the *Auerbach* case, a corporation's board of directors, upon learning that a derivative action had been filed against a number of the individual directors and officers of the corporation, promptly appointed a litigation evaluation committee comprised of directors who were not serving in that capacity at the time of the incidents

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cited in the complaint, and vested that committee with the plenary power of the board to make any decisions appropriate as to the claims made in the derivative action. The board as a whole took no action in regard to the derivative action after this point, and the committee was never intended to operate only in an advisory capacity. The undisputed facts as they appear in the record and the exhibits of the case before us are as follows:

1. defendants Clark, Thompson, Nichols, Leleux, Hawkins, Duhe, Begnaud, Bares, Backus and Walton were members of All American's board of directors at the time of the events complained of.

2. this same group of individuals constituted a majority of the board of directors of All American at the time of the events complained of.

3. this same group of individuals presently constitutes a majority of All American's board of directors.

4. the seven purportedly disinterested directors of All American were nominated and elected by this group of individuals.

5. that a litigation evaluation committee, comprised of three of the purportedly disinterested directors, was appointed 3 February 1977 to investigate and evaluate potential claims All American might have against a number of individuals, including the defendants listed in (1) above.

6. the litigation evaluation committee was *not* vested with the plenary powers of the full board, but was *only* an advisory group whose task it was to report to the full board its recommendations as to potential litigation.

7. at the same 3 February 1977 meeting of the All American board at which the litigation evaluation committee was appointed, the full board decided by resolution to vigorously resist the derivative action claims filed by plaintiffs.

8. the motion to disqualify plaintiffs' counsel, which was the first affirmative act of All American in this case, was filed by counsel for All American on 2 February 1977 supporting an inference that the decision to resist the suit brought against the

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defendant directors controlling All American's board was made prior to the formation of the litigation evaluation committee.

9. there appears of record no evidence that any independent judgment was at any time exercised by the litigation evaluation committee in regard to the derivative action claims.

The business judgment rule, stated simply, provides that when a corporation's decision not to assert a claim represents a good faith business judgment by its directors, a shareholder will not be permitted to substitute his judgment for that of the company's management by asserting the claim in a derivative action. *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 37 S.Ct. 509, 61 L.Ed. 1119 (1917). Accordingly, where the business judgment question is presented to a court as a ground for dismissal, the sole issue for determination is whether the decision was made in good faith. *Swanson v. Traer*, 249 F. 2d 854 (7th Cir. 1957). In the instant case, the trial judge concluded that on the facts before him there could not have been, as a matter of law, any good faith in the decision of these directors not to proceed with the claims represented by the derivative action. As the motion for dismissal pursuant to the business judgment rule presented matters outside the pleading, it was properly treated as a motion for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure, as provided by Rule 12(b) of the North Carolina Rules of Civil Procedure. No material facts appear from the record to have been in controversy concerning the manner in which the decision to resist the derivative action was reached, and it hardly could be expected that the members of the litigation evaluation committee would seek to persuade the majority of the board of All American to reverse its decision of 2 and 3 February 1977. Defendants presented evidence by affidavit on their motion, some of which had exhibits attached that clearly establish the facts as we have summarized them above. The plaintiffs did not produce evidence on the motion, relying apparently upon the inferences arising upon the face of defendants' evidence. We conclude that there was ample competent evidence before the court to sustain its finding that the decision of All American not to pursue any claims against the directors now defendants was not made independently of those interested directors and therefore was not in good faith. None of the authority cited to us by defendants is in any way inconsistent with the trial judge's

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ruling, as they clearly emphasize the fundamental importance of *independent* judgment by directors as being crucial to the good faith question. Therefore, summary judgment was properly entered against defendants as to this defense and we affirm the ruling of the trial judge on the point. The individual defendants' pertinent assignments of error are overruled. As was noted *supra*, this defense is one on the merits and is not one which the corporate defendant has standing to assert. Accordingly, All American's appeal as to this matter is dismissed.

IV

All American and the individual defendants filed motions to disqualify counsel for the plaintiffs, alleging violations of Canons 2 (in that the firm of CLP&Y improperly solicited clients to be plaintiffs to this action), 4 (in that CLP&Y was using confidences and secrets gained in prior representation of All American to the present and serious detriment of All American), 5 (in that the fee arrangement entered into by plaintiffs and CLP&Y, whereby CLP&Y would receive a one-third interest in the shares it was representing, would constitute an acquisition by CLP&Y of an improper interest in the subject matter of the litigation), and 9 (in that all of the foregoing actions of CLP&Y distinctly gave the appearance of impropriety and called into disrepute the entire legal profession) of the Code of Professional Responsibility and the Disciplinary Rules thereunder as the basis for such disqualification. The trial judge heard and received evidence on the motions at the conclusion of copious discovery, and denied all of the motions. Defendants contend, alternatively, that the denial of the motions was an abuse of discretion on the part of the trial judge and that, for purposes of review of the trial judge's rulings on the ethical questions, the question confronting us is not whether the trial judge abused his discretion, but whether his actions reflected a correct and appropriate understanding of the applicable legal and ethical principles in the context of the evidence before him, placing this Court in the position of functionally sitting as a court of original jurisdiction to consider these ethical questions without reference or deference to the proceedings below. Defendants rely upon *Aetna Casualty & Surety Co. v. United States*, 570 F. 2d 1197 (4 Cir. 1978). This case noted that where facts were not in substantial dispute and the question of disqualification was essentially one of law, the trial court enjoys

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no particular functional advantage over appellate courts in their formulation and application of ethical norms. *See, e.g. Woods v. Covington Cty. Bank*, 537 F. 2d 810 (5 Cir. 1976). This concept is not new or strange to us. *See, In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978); *In re Dale*, 37 N.C. App. 680, 247 S.E. 2d 246 (1978). It does not mean, however, that we will ignore or give only minimal deference to the findings and conclusions of the trial judge in reference to these ethical questions.

[10-12] North Carolina is different from many other jurisdictions in that there is a dual mechanism for the regulation and discipline of attorneys practicing in the state courts. The North Carolina State Bar, having established a Code of Professional Responsibility to which its members are required to conform as a condition precedent to the continuing practice of law in North Carolina, is empowered by statute (G.S. 84-28) to discipline attorneys and regulate their conduct. Another statute in the same chapter, (G.S. 84-36), however, saves and protects the inherent powers of the court to regulate and discipline attorneys practicing before it. This power of the court is an inherent one because it is an essential one for the court to possess in order for it to protect itself from fraud and impropriety and to serve the ends of the administration of justice which are, fundamentally, the *raison d'être* for the existence and operation of the courts. *See, Inherent Powers of the Court*, National College of the State Judiciary (Reno, Nevada: 1973). This inherent power is co-equal and co-extensive with the statutory grant of powers to the North Carolina State Bar, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from those of the North Carolina State Bar, the action of a court in disciplining or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the Bar. It is to be noted that steps are being taken to link more closely the disciplinary functions of the Bar and the courts. However, it is clear that the court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar.

We make these statements by way of introducing the peculiar situation presented to us by this appeal. Two of the

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ethical questions raised, one dealing with the improper use of confidences and secrets of a client, and the other dealing with the possible acquisition by plaintiffs' counsel of an improper interest in the subject matter of the instant litigation, are clearly germane to the merits of the case, were properly raised before the trial court and would necessarily have to be decided before the other issues of the case proceeded to trial on the merits. The questions raised concerning solicitation and appearance of impropriety issues, would more appropriately have been raised within the Bar's own disciplinary machinery, as any violations of these Canons (2 and 9) in the instant case do not present aggrieved parties on appeal in any conventional sense. However, even these issues could properly be dealt with by the trial court in its inherent power, as all of the parties apparently raised no objection to the jurisdiction of the court to hear the matters, and the trial court received all evidence offered by the parties on all the issues in order to make its ruling. Accordingly, we will review the findings and rulings of the trial court on the ethical questions and will consider all of the same evidence which was before the trial judge and reach our own conclusions based upon the record and exhibits. *See, In re Dale, supra.*

[13] Judge Friday found that no attorney-client relation had arisen between CLP&Y and All American that would justify the assertion of an attorney-client privilege by All American in this action, particularly as against its minority shareholders. Upon a thorough examination of the record and its exhibits, we agree. Our agreement is premised upon two considerations.

First, the record makes plain that:

1. all of the transactions and occurrences complained of in the present action were *fait accompli* at the time CLP&Y began to represent All American just prior to the initiation of rehabilitation proceedings.

2. the firm of CLP&Y was retained for the purposes of representing All American and not its board of directors, and its role was of necessity an investigatory one which would inevitably culminate in public disclosures relevant to the matters now complained of.

3. the role of CLP&Y was from the first adverse to the interests of management and the directors, and concurrent with the

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interests of All American as a corporate entity and the interests of the minority shareholders who are now bringing this action derivatively. In the case of *Ingram, Comm. of Insurance v. Assurance Co.*, 34 N.C. App. 517, 239 S.E. 2d 474 (1977), (an appeal of a matter concerning the rehabilitation of All American) counsel for All American, the same counsel who purportedly represent All American in the present action, had the following to say about CLP&Y in their brief:

To whom was Cansler, Lockhart, Parker & Young, P.A. accountable? It was the conclusion of the trial court that All American was entitled to representation. But a corporation normally speaks through its officers and board of directors. The board of directors of All American attempted to employ counsel other than Cansler, Lockhart, Parker & Young, P.A. in November, 1975. Such corporate action was subsequently declared ineffective by the trial court in its order of November 14, 1975. The language of such order went further, however, than simply to declare that the attempted discharge of Cansler, Lockhart, Parker & Young, P.A. and employment of other counsel had been improperly accomplished. It stated affirmatively that Cansler, Lockhart, Parker & Young, P.A. was "designated counsel [for All American] IN THIS PROCEEDING." The court order, therefore, made clear that All American was not to be allowed to employ legal counsel of its own choosing.

In addition, the court's earlier order of November 7, 1975, made clear that All American was not to be represented by counsel selected by the rehabilitator. The court itself assumed the authority to choose counsel for All American, in the face of the expressed opposition of all parties to the proceeding and in derogation of the court's own conclusion that All American was entitled to independent legal representation in the action. The status of Cansler, Lockhart, Parker & Young, P.A. was not only independent from the rehabilitator but also from All American. *No party to the lawsuit had authority over Mr. Lockhart and he acted with absolute independence first in defending against rehabilitation and subsequently in defending against termination of rehabilitation.* (Emphasis ours.)

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Respondent appellant's brief, pages 8-9, filed 26 January 1977, No. 7726SC13, North Carolina Court of Appeals. Although the passage quoted above deals with the rehabilitation proceeding, that proceeding followed closely the initiation of a relation between the corporate entity All American and CLP&Y. The purported voice of All American was in fact the voice of the directors who are now defendants and whose interests were and are adverse to those of All American as a corporate entity. The representation by CLP&Y, whether actually or derivatively of All American, has continued from its inception to serve *only* the interests of the corporate entity, a posture that is wholly consistent with Ethical Consideration 5-18, Code of Professional Responsibility.

Secondly, we held above that the corporate entity All American must be treated as a party plaintiff for purposes of litigation on the merits of this action, particularly since the individual defendant directors effectively controlled the voice of the corporation. The gravamen of the motion to disqualify on Canon 4 grounds is to prevent knowledge (and evidence obtained by benefit of that knowledge) from being used to the detriment of the client from whom it was initially obtained in the context of a confidential relationship. It is abundantly clear from the record that no confidential relationship was ever developed between any of the individual defendants and CLP&Y, and so if any privilege is to be asserted as to any communications made by them to CLP&Y, it must be asserted by the corporate defendant or not at all. We conclude that All American lacks standing as a party plaintiff to assert this privilege against itself. Likewise, the individual defendants have no standing, upon the record before us, to assert this privilege or invoke any sanctions against CLP&Y under Canon 4. *See, e.g., Meehan v. Hopps*, 144 Cal. App. 2d 284, 301 P. 2d 10 (1956); *U.S. Industries, Inc. v. Goldman*, 421 F. Supp. 7 (S.D.N.Y. 1976). *Cf. E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Texas 1969). The appeal of All American as to Canon 4 questions is dismissed. The assignments of error of the individual defendants are overruled. We adopt the trial judge's conclusion that there were no violations of Canon 4.

[14] The defendants have contended that CLP&Y acquired an improper interest in the subject matter of the litigation in violation of Canon 5, in that CLP&Y has acquired substantial holdings in All American under the fee contracts executed by the in-

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dividual shareholders. These contracts provided for the escrow of all shares with nominal plaintiff Norman Swenson, and for a one-third interest of such shares (or equivalent value) to be given to CLP&Y in consideration of CLP&Y's legal services rendered to plaintiffs. At the time these contracts were executed, the shares were worth between \$.50 and \$1.00 per share, and the prospect of their becoming wholly worthless was not remote. The trial judge concluded that this was a fee arrangement in the nature of a contingent fee and was not improper. We note that representation preceded acquisition of these interests in the shares, and adopt the trial judge's conclusions. No cases have been cited which would give any support to a contrary conclusion. These assignments of error are overruled and we adopt the conclusions of the trial judge as to the Canon 5 questions.

[15] As to whether CLP&Y conducted improper solicitation, the record shows that Lockhart did not at any time personally solicit any clients, nor did he cause others to do so for him. There is no need to review here the quantity of evidence upon which the trial judge relied for his findings; suffice it to say it was ample to support his conclusions and our independent study of the same materials brings us to a like conclusion. The defendants' assignments of error on this point are overruled.

We have also carefully considered the arguments made by defendants under Canon 9 concerning the "appearance of impropriety" on the part of CLP&Y and agree with the trial judge that no violation is made to appear on the present facts. These assignments of error are overruled.

The trial judge, at the conclusion of his order denying the disqualification motions, made the following statements which we quote, endorse and adopt as our own:

10. This Court has the inherent power to supervise the conduct of litigation which comes under its jurisdiction to insure that the interests of justice are served. In addition to the legal grounds and conclusions heretofore recited, this Court, in the exercise of its discretion, determines that disqualification of counsel on the facts revealed in this record would tend to defeat or impair, rather than promote the ends of justice and that this consideration, standing alone, would amply warrant denial of the pending motion.

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11. The preservation of the integrity of North Carolina contracts, the protection of in-state and out-of-state stockholders in North Carolina corporations and the interest of the State of North Carolina in the integrity of insurance companies incorporated in this State are paramount in this case and outweigh all of the considerations advanced by the moving parties in support of the motion to disqualify.

Perfectly consonant with these conclusions of the trial judge is this portion of the *amicus* brief filed by the Connecticut Bar Association in *International Electronics Corp. v. Flanzer*, 527 F. 2d 1288 (2 Cir. 1975) and quoted by the Court in that opinion:

It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits. 527 F. 2d at 1293; *Aetna Casualty & Surety Co. v. United States*, 570 F. 2d 1202 (1978).

The rulings of the trial judge, upon the evidence before him, are in complete agreement with the conclusions we reach upon the same evidence, and we, too, bow to the ends of justice as our ultimate goal in not only affirming but adopting his rulings on these questions.

V

[16] Defendants have contended that the trial court erred in denying their motion to disqualify plaintiffs' counsel because the findings of fact in support of the court's order denying the disqualification motions were based upon incompetent evidence. Seven assignments of error, framing a majority of the 569 exceptions taken by defendants in the course of the pretrial proceedings, are brought forward by this question. This diffuse approach to the question makes it extremely difficult for this Court (or any other) to consider the problems complained of in the degree of detail we would ordinarily consider appropriate. The many exceptions are duplicative and some border on the

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frivolous. Nevertheless, we have carefully examined those which are meritorious on their face, and have thoroughly searched the record and exhibits with reference to the question presented. We are satisfied that there is ample competent evidence in the record to support the trial judge's findings. The trial judge is certainly not to be censured for failing to rule individually on each objection of counsel when, as was the case here, they were made with such frequency as to pose a serious threat to the eventual termination of the action because of the physical limitations of time and energy of the trial judge. We find no indication that the trial judge "clearly relied on incompetent evidence" and so we will assume that he disregarded any incompetent evidence in the record in reaching his conclusions. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668 (1958). These assignments of error are overruled.

Defendants also assign error to certain of the trial judge's findings, contending that they were unrelated to the issue before him. A detailed review of the exceptions contained in this assignment of error would be fruitless; they are without merit and the assignment of error is overruled.

VI

[17, 18] Plaintiffs bring forward one exception and assignment of error, contending that the trial judge erred in failing to grant their motion to enjoin All American from advancing any legal fees to the directors being sued and from participating in the further defense of the action. G.S. 55-19(d) permits a domestic corporation to advance legal fees to a director who is being called upon to defend an action brought in relation to his activity as a director, if that director gives to the corporation an "undertaking" that he will repay the monies so advanced if he is unsuccessful in his defense. Plaintiffs argue that the provisions of G.S. 55-30, governing transactions between interested directors and their corporations, would operate to prevent 55-19(d) from being effective on the particular facts of this case. We do not agree. It does not appear to us that the advancement of legal fees under 55-19(d) is necessarily a transaction in which a director is adversely interested, and even if it were, the disinterested directors of All American approved the advancement in this instance. The "undertaking" required by 55-19(d) for the repayment of fees advanced if the director is unsuccessful is just that: a written promise, not

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made under seal, given as security for the performance of some act as required in a legal proceeding. Had the statute been intended to require a full security for all advancements, it could have so provided; we will not construe it to mean something contrary to the plain meaning of the language on its face. Plaintiffs' motion to enjoin All American from further action in its defense is made moot by our holding in section II above. The assignment of error is overruled.

This is not to say that under *all* circumstances the trial judge would be powerless to enjoin an advancement of legal fees by a corporation to its directors. However, on the facts before us and before the trial judge, he correctly ruled that he had no power to enjoin literal compliance with the applicable statute.

VII

We commend the learned trial judge for his meticulous handling of this lengthy and extraordinarily complex matter. Such a proceeding places enormous strains upon a trial judge, and the extent to which the record before us is error-free demonstrates Judge Friday's high degree of capability.

In summary:

1) Plaintiffs' assignments of error are overruled and the ruling of the trial judge is affirmed.

2) The order of the trial judge denying motions by the individual defendants to dismiss for lack of personal jurisdiction is affirmed.

3) The order of the trial judge denying defendants' motions to disqualify plaintiffs' counsel is affirmed; All American's appeal as to Canon 4 issues is dismissed.

4) All American's appeal from Judge Friday's order denying motions to dismiss on grounds of business judgment and indefiniteness of damages as pleaded pursuant to Rule 12(b) and Rule 56 of the North Carolina Rules of Civil Procedure is dismissed. The order of the trial judge denying All American's motions to dismiss on other 12(b) grounds is affirmed.

5) The appeals by the individual defendants from the trial judge's order denying motions to dismiss on grounds of failure on

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part of plaintiffs to comply with the prerequisites for filing a derivative action are dismissed. The order of the trial judge denying the other motions to dismiss pursuant to Rule 12(b) and Rule 56 of the North Carolina Rules of Civil Procedure is affirmed.

Affirmed in part and dismissed in part.

Judges VAUGHN and MITCHELL concur.

GEORGE HARVEY CAMPBELL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE CITIZENS AND TAXPAYERS OF DURHAM, NORTH CAROLINA v. FIRST BAPTIST CHURCH OF THE CITY OF DURHAM, AN UNINCORPORATED ASSOCIATION; THE CITY OF DURHAM; THE REDEVELOPMENT COMMISSION OF THE CITY OF DURHAM; AND THE UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JAMES T. LYNN, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

No. 7414SC1023

(Filed 19 December 1978)

1. Municipal Corporations §§ 4.5, 22.3— property exchange between city and church—private sale

The "exchange" of property between a redevelopment commission and a "redeveloper" such as the church in this case, is nothing more than a "private sale" of real property to "a nonprofit association or corporation operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes" as described in G.S. 160-464(d), and such exchange must be in compliance with all of the requirements of G.S. 160-464(e)(4).

2. Municipal Corporations § 4.5— redevelopment commission—conveyance to nonprofit association—requirements

Before it can lawfully convey property to a nonprofit association or corporation within the meaning of G.S. 160-464(d), a redevelopment commission must: (1) hold a public hearing on the proposed conveyance after proper advertisement, (2) get approval for the proposed conveyance from the governing body of the municipality, and (3) agree with the proposed transferee on the consideration for the conveyance which is not less than the fair value of the property as determined by a committee of three professional real estate appraisers.

3. Municipal Corporations §§ 4.5, 22.3— property exchange between city and church—failure to comply with statute—conveyances void

The purported conveyance of certain property by the Durham Redevelopment Commission to the First Baptist Church of Durham was null and void,

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since the Commission did not meet the statutory requirements of G.S. 160-464(e)(4) in that (1) the Commission had already determined to exchange the land at the time it published its advertisement in a local newspaper, though it was clear from the statute that the advertisement must precede the public hearing on the proposed conveyance, and (2) the appraisals on which the Commission based its determination of fair market value were made individually, though the statute clearly provided that the conveyance should not be for "less than the fair value of the property agreed upon by a committee of three professional real estate appraisers."

4. Municipal Corporations § 4.5— instruments executed by urban redevelopment commission—no revival of instrument void from inception

G.S. 160-472 (now G.S. 160A-522) providing that "[a]ny instrument executed by a commission and purporting to convey any right, title or interest in any property under this Article shall be conclusive evidence of compliance with the provisions of this Article" is not available to revive an instrument that was void from its inception.

5. Municipal Corporations § 4.5; Taxation § 6.2— city's funding of urban renewal plan—grants-in-aid—no improper pledge of city's faith and credit

A cooperation agreement entered into by the City of Durham and the Durham Redevelopment Commission whereby the city obligated itself to provide funding for one-third of the cost of the urban renewal plan did not pledge the faith and credit of the city in violation of Art. VII, § 6 of the N.C. Constitution, since the city planned to finance its part of the urban renewal plan with grants-in-aid; the city could substitute a valid grant-in-aid for any that were determined to be invalid or deficient in some way; and plaintiff failed to show that the city would be unable to meet its obligations under the cooperation agreement except by spending public funds for unnecessary purposes.

APPEAL by plaintiff from *Brewer, Judge*. Judgment entered 28 June 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals on 16 October 1978.

This is a civil action commenced in 1973 by plaintiff on behalf of all citizens and taxpayers of the City of Durham seeking to have declared void an exchange of real estate between the First Baptist Church and the Redevelopment Commission of the City of Durham made pursuant to the urban renewal project for the Durham Central Business District. Plaintiff alleges that the exchange violated certain statutory requirements governing the disposal of land by a redevelopment commission, constituted an arbitrary and capricious abuse of discretion on the part of the Redevelopment Commission, and violated the Establishment Clause of the First Amendment to the United States Constitution. Plaintiff also seeks to have declared void a Cooperation Agree-

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ment executed in connection with the Urban Renewal Project between the City of Durham and the Redevelopment Commission on the grounds that it violates former Art. V, §§ 2(5) and 4(2) of the North Carolina Constitution¹ prohibiting a municipality from pledging its faith and credit without voter approval.

The relevant uncontroverted facts involved in the long history of this case may be summarized as follows:

On 14 August 1964, the Redevelopment Commission approved an urban renewal plan, Project NC R-26, for the Central Business District of the City of Durham. On 22 March 1965, the Durham City Council approved the Redevelopment Commission's plan. In 1965, the Redevelopment Commission entered into a contract with the United States Urban Renewal Administration (now known as the Department of Housing and Urban Development) under which federal funds were made available to the Redevelopment Commission for purposes of land acquisition and redevelopment.

Pursuant to Project NC R-26, the Redevelopment Commission planned to acquire the two tracts of land involved in the exchange in the present case. The first tract, bounded by Cleveland, Elliot, and Roxboro Streets, was known as the "Markham property." This tract contained approximately 44,614 square feet of which 15.8% was to be used for widening Elliot and Roxboro Streets. The second tract, a strip of land fronting on Roxboro Street and located in the same block, was owned by the First Baptist Church. The Church property sought to be acquired was 12 feet wide and 234 feet long and contained approximately 2,803 square feet, all of which was to be used for widening Roxboro Street.

The Church indicated an interest in acquiring the Markham tract as early as 11 July 1964 when it sent a letter to the Redevelopment Commission stating: "We would like to record

1. Session Laws 1969, c. 1200, s. 1, proposed a constitutional amendment that was adopted by popular vote on 3 November 1970, effective 1 July 1973, which rewrote Article V, eliminating the provisions at issue in the present case. Prior to their repeal, the provisions of Article V at issue were as follows:

§ 2(5) No tax shall be levied or collected by the officers of any county, city or town, or other unit of local government, except for the necessary expenses thereof, unless approved by a majority of the qualified voters who vote thereon in any election held for the purpose.

§ 4(2) No county, city or town, or other unit of local government shall contract any debt, pledge its faith, or lend its credit except for the necessary expenses thereof, unless approved by a majority of the qualified voters who shall vote thereon in any election held for that purpose.

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with you our interest in acquiring property adjacent to the First Baptist Church, Durham, North Carolina, at a fair market price. The above, of course, is contingent upon when and if the redevelopment plans go into effect involving property near our church."

In connection with its efforts to acquire the Markham property and the Church strip, the Redevelopment Commission employed four real estate appraisers to make appraisals of the value of the tracts. As it originally existed, the Markham property contained approximately 53,000 square feet and was zoned C-2 Commercial. On 1 September 1963, Joseph A. Robb filed a parcel acquisition report with the Redevelopment Commission stating that the value of the Markham property was \$91,500. A second acquisition appraisal by Charles W. Smith found the value to be \$94,000.

The Redevelopment Plan proposed certain changes in the zoning ordinance for the City of Durham for the project area. The Plan proposed that the area encompassing the Markham property and the Church property would have its zoning changed from C-2 Commercial to RA 7-16 Residential. The Plan further proposed that the subject property would be designated for "Institutional Use." On 11 March 1969, a new zoning ordinance was enacted by the City of Durham under which the subject property was zoned RA 7-16 Residential.

The Redevelopment Commission, contemplating the zoning change, contracted with three appraisers to have the Markham property appraised under the RA 7-16 Residential zoning. E. Judson Pickett, a member of the First Baptist Church, submitted two appraisals, one of \$51,500 and a second of \$12,800. Joseph A. Robb submitted an appraisal of \$15,614 and Thomas T. Hay submitted an appraisal of \$48,600.

On 22 December 1969, Joseph A. Robb submitted an appraisal of the Church strip to the Redevelopment Commission. Although the strip was zoned RA 7-16 Residential, Robb's appraisal of \$18,750 was based on the value of the property under C-2 Commercial zoning. On 15 January 1970, Charles W. Smith submitted an appraisal of \$16,050 also based on C-2 Commercial zoning. On 3 March 1970, the Redevelopment Commission deter-

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mined that the Church property had a value of \$17,500 based on these two appraisals.

On 22 December 1970, the Redevelopment Commission instituted condemnation proceedings in order to obtain title to the Markham property. A jury determined the value of the Markham property based on C-2 Commercial zoning to be \$164,300. The Redevelopment Commission obtained the property for this price.

On 4 February 1970, the Redevelopment Commission adopted a resolution approving the concept of an exchange of the parcels of land involved in this case with the Church and authorizing its Executive Director and attorney "to proceed with expediting the land exchange." On 16 October 1972, the Durham City Council approved the land exchange between the Redevelopment Commission and the Church. Two advertisements were published by the Redevelopment Commission with respect to the proposed land exchange between it and the Church on 7 November and 14 November 1972. The published notice stated in pertinent part:

ADVERTISEMENT FOR EXCHANGE OF LAND

The Redevelopment Commission of the City of Durham, having by Resolution duly adopted, determined that in the best interest of the Project, hereby gives notice that on or after the 22nd day of November, 1972, it will enter into a contract to convey to The First Baptist Church of Durham, North Carolina to the Redevelopment Commission of the City of Durham of [sic] the hereinafter-described tract or parcel of land (Tract No. 2 Below)

The proposed price for Tract No. 1, which the Redevelopment Commission of the City of Durham proposes to convey to First Baptist Church of Durham, North Carolina is \$.35 per square foot, for a total of \$15,614.83. The proposed price for Tract No. 2, which First Baptist Church of Durham, N. C. proposes to convey to the Redevelopment Commission of the City of Durham is \$17,500.00. Therefore, based on the foregoing exchange or [sic] properties between the Redevelopment Commission of the City of Durham and The First Baptist Church of Durham, North Carolina, the Redevelopment Commission of the City of Durham will owe the First Baptist Church of Durham, North Carolina the sum of \$1,885.17,

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which is the difference between the fair market value of both tracts, that is \$15,614.83, the fair market value of Tract No. 1, less \$17,500.00, the fair market value of Tract No. 2.

The two deeds effecting the exchange of the properties were recorded on 19 January 1973.

Plaintiff instituted this action on 7 February 1973 and filed motions for a preliminary injunction and temporary restraining order on the same date seeking to prevent the defendants from making any improvements on the property. A temporary restraining order was issued but subsequently dissolved when the court also denied plaintiff's motion for a preliminary injunction and for an injunction during pendency of his appeal. This Court, in *Campbell v. First Baptist Church*, 19 N.C. App. 343, 199 S.E. 2d 34, cert. denied, 284 N.C. 252, 200 S.E. 2d 652 (1973), held: "The order appealed from insofar as it denied plaintiff's motion for a preliminary injunction, is reversed and this cause is remanded to the Superior Court in Durham County for entry of a preliminary injunction in accordance with this opinion." The defendant's petitions for Writs of Certiorari and Supercedeas were denied by the North Carolina Supreme Court on 1 November 1973.

Plaintiff then filed a new motion for a preliminary injunction. On 10 December 1973, a peremptory trial date of 22 January 1974 was set and action on plaintiff's motion was continued until trial.

Trial was begun on 23 January 1974 and plaintiff presented evidence in support of his first cause of action. On 25 January 1974, defendants First Baptist Church and Redevelopment Commission moved to join as additional defendants the United States of America, Department of HUD, and certain individuals, firms, and corporations who had purchased or acquired by exchange real property from the Redevelopment Commission. This motion was granted; and on 28 January 1974, trial was recessed to allow the additional defendants joined in the second cause of action only to file answers.

Trial was resumed on 13 May 1974; and on 14 May 1974, all the additional defendants except the United States of America were dismissed. On 28 June 1974, final judgment in the case was entered in which the Court made detailed findings of fact, pertinent portions of which are quoted below:

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3. That the Redevelopment Plan, as described in the above Paragraph 1, contained agreement that as of the date of the last Amendment—to wit, the 17th day of October, 1973—the net project cost for Project NC R-26 would be \$18,460,878.00, and that available to the City to cover the City's one-third share of the net project cost, as contemplated in said Plan, was the sum of \$6,994,650.00 non-cash local grants-in-aid (estimate accepted by HUD), and the sum of \$96,100.00 representing credits generated by the tax-exempt status of real property held by the Redevelopment Commission of the City of Durham in the project area.

4. That contained in the Plan, as amended, was the construction of the following projects in or close to the project area of Project NC R-26 for the eligible cost of which the City will receive non-cash credits toward meeting its obligations as above described:

<u>ITEM</u>	<u>CREDIT</u>
<u>Demolition:</u>	
Federal Aid Work	\$ 28,925
Parking Lots Nos. 2 & 8	8,212
<u>Site Improvements:</u>	
Traffic Signals	1,782
Pedestrian Way, Market Street	24,647
Morgan Street, R/W Corner	92,420
Holloway, Mangum & Roxboro Streets	736,260
Bridges-Roxboro Street & Peabody	939,383
<u>Public or Supporting Facilities:</u>	
Parking Facility No. 1	1,137,154
Parking Facility No. 2	1,165,000
Proposed Parking Facilities	1,804,736
Storm Drainage	776
Parking Lot No. 8	281,408
Parking Lot No. 2	222,749
Ramp Cost (A-G)	61,378
R/W Ramps (A-G)	261,808
Police Station	228,012
TOTAL	<u>\$6,994,650</u>

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That the Department of Housing and Urban Development has approved these projects as being eligible to provide non-cash credits and has agreed that if properly documented they would generate credits in the amounts listed beside each project.

5. That of these projects described above, all have been completed by the City of Durham except those described as Holloway, Mangum and Roxboro Streets, "Bridges—Roxboro Street and Peabody", "Proposed Parking Facilities", and "Storm Drainage". The Holloway, Mangum and Roxboro Streets project is now underway; and the bridges for Roxboro Street and Peabody Street have been planned and are budgeted, awaiting implementation. The proposed parking facilities, while agreed to by the City, have not been specifically located in the Project NC R-26 area. The storm drainage is to be accomplished from time to time. . . .

8. . . . The Redevelopment Plan for Project NC R-26 . . . provides for two-thirds (2/3) of the net project cost to be provided by financial assistance from the Federal Government and one-third (1/3) to be provided by local non-cash grants-in-aid. Neither the City of Durham nor the Redevelopment Commission of the City of Durham has made any agreement which, in fact, creates a debt or pledge of faith or loan of credit by the City within the meaning of Article V, Section 2(5), or Section 4(2), of the Constitution of North Carolina. The Plan calls for no cash contribution by the City of Durham and contemplates that the entire contribution by the City would be made by credits generated by improvements constructed by the City in this and other projects; and there is no evidence nor contention that these improvements cannot be properly financed by use of City funds.

9. . . . [If] the project is allowed to continue to its completion, the City of Durham can be expected to provide all of its share of the cost through non-cash local grants-in-aid—substantially all of which have already been provided except for certain additional proposed parking facilities which would apparently be necessary to support the activities contemplated for the project area in any event.

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10. That in support of the financing plan contained in the Redevelopment Plan for Project NC R-26, as originally adopted, the Redevelopment Commission and the City of Durham entered into an agreement under the date of July 25, 1968, which is attached to the Complaint in this action as Exhibit "C". That agreement amplified and clarified the City's obligation assumed under the Redevelopment Plan for providing local grants-in-aid, and the supporting facilities described in said Contract to be constructed by the City did provide local non-cash credits which would cover the City's share of the then estimated cost of carrying out the project. This agreement expressly negates contributions by the City of funds in violation of constitutional provisions. It implements and clarifies the City's obligation contained in the financing plan of the Redevelopment Plan for the project, which financing plan called for no cash contribution by the City of Durham, and contemplated that the entire contribution of the City would be met by credits generated by improvements constructed by the City in this and other projects and credits arising because of the tax-exempt status of property held by the Commission.

...

14. That the parcel of land conveyed to the Church and the parcel of land conveyed to the Commission under the provisions of the Redeveloper's Contract entered into by the Church as a "Redeveloper" within the meaning of G.S. 160A-503 were both in the project area of Project NC R-26; and the Redevelopment Commission in making the conveyance to the Church and accepting the conveyance from the Church, and the City of Durham in approving the transaction, were proceeding under the provisions of the section of the State Urban Redevelopment Law, now designated G.S. 160A-514(c), and considered the transaction an "exchange" rather than a "sale" or a private sale to a non-profit association.

...

16. . . . The Church was a bona fide purchaser within the meaning of G.S. 160A-522.

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The Court entered the following judgment:

1. That the conveyance by the Redevelopment Commission to the First Baptist Church and the conveyance by the First Baptist Church to the Redevelopment Commission, as described hereinabove, were lawful conveyances.

2. That the First Baptist Church, in any event, was a bona fide purchaser; and the provisions of G.S. 160A-522 are applicable.

3. That the defendant, First Baptist Church, has a good and valid title to the real property described in the Deed from the Redevelopment Commission to the said First Baptist Church . . .

4. That the Redevelopment Commission of the City of Durham has good and valid title to the property described in the Deed from the First Baptist Church to the Redevelopment Commission . . .

5. That the financing plan of the Redevelopment Plan for Project NC R-26 meets all of the requirements of the Urban Renewal Law of the State of North Carolina and the Federal Statutes and does not violate any constitutional provision of either the State or Federal Constitutions.

From the foregoing judgment, plaintiff appealed.

Blackwell M. Brogden for the plaintiff appellant.

Haywood, Denny and Miller, by Egbert L. Haywood, for defendant appellee First Baptist Church of the City of Durham.

William Thornton for defendant appellee City of Durham.

Edwards & Manson, by Daniel K. Edwards, for defendant appellee Redevelopment Commission of the City of Durham.

HEDRICK, Judge.

The first question presented by this appeal is whether the Redevelopment Commission complied with the applicable statutory provisions in disposing of the "Markham Property" by exchange with the First Baptist Church. G.S. § 160-462(6) [now G.S. § 160A-512(6)] contains a specific grant of power to a

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redevelopment commission enabling it to sell, exchange, transfer or otherwise dispose of real property "subject to the provisions of G.S. § 160-464, and with the approval of the local governing body." Plaintiff contends that the conveyances effecting the exchange of properties are void because the Commission acted outside the authority granted to it under G.S. § 160-462(6) by its failure to comply with the statutory procedures contained in G.S. § 160-464(e)(4), [now G.S. § 160A-514(e)(4)] which provides:

In carrying out a redevelopment project, the commission may:

...

- (4) After a public hearing advertised in accordance with the provisions of G.S. 160-463(e), and subject to the approval of the governing body of the municipality, convey [real property] to a nonprofit association or corporation . . . Such conveyance shall be for such consideration as may be agreed upon by the Commission and the association or corporation, which shall not be less than the fair value of the property agreed upon by a committee of three professional real estate appraisers currently practicing in the State . . .

The defendants contend that the exchange is governed by G.S. § 160-464(c) [now G.S. § 160A-514(c)], which provides:

A commission may sell, exchange, or otherwise transfer real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan, subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes of this Article; provided that such sale, exchange or other transfer, and any agreement relating thereto, may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as specified in subsection (d) below.

Defendants argue that the transaction involved is an "exchange" and is to be distinguished from a "sale" or a "private sale" and thus the proviso contained in subsection (c) is not ap-

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plicable since it refers to subsection (d), which deals only with the statutory requirements where the disposal is by a "sale" or "private sale" and nowhere mentions "exchanges". G.S. § 160-464 (d) [now G.S. § 160A-514(d)] provides in part:

Except as hereinafter specified, no sale of any property by the commission or agreement relating thereto shall be effected except after advertisement, bids and award as hereinafter set out . . . Nothing herein, however, shall prevent the sale at a private sale without advertisement and bids to the municipality or other public body, or to a non-profit association or corporation operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes, of such property as is specified in divisions (1), (2), (3), or (4) of subsection (e) of this section, provided that such sale is in accordance with the provisions of said subdivisions . . .

Defendants further contend that G.S. § 160-464(e)(4) is not applicable because it is merely one method by which a redevelopment commission may dispose of property and not the exclusive method. In essence, defendants argue that the Redevelopment Commission has authority to "exchange" property with a "redeveloper" such as the First Baptist Church without complying with any of the statutory procedures required where the disposal of land is by a sale, either public or private.

In *Campbell v. First Baptist Church*, 19 N.C. App. at 346, 199 S.E. 2d at 36, Chief Judge Brock speaking for this Court stated:

It appears that compliance with the terms of the statute [G.S. § 160-464(e)(4)] by the Redevelopment Commission is necessary before it can legally make an *exchange* as described by plaintiff's evidence. Therefore, if the Redevelopment Commission makes such an *exchange* without effectively complying with the statute, it acts outside of its authority. (Emphasis supplied.)

[1] We hold that the "exchange" of property between a redevelopment commission and a "redeveloper" such as the First Baptist Church in this case, is nothing more than a "private sale" of real property to "a nonprofit association or corporation operated exclusively for educational, scientific, literary, cultural,

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charitable or religious purposes" as described in G.S. § 160-464(d) and that such exchange must be in compliance with all of the requirements of G.S. § 160-464(e)(4).

[2] Before it can lawfully convey property to such a "nonprofit association or corporation," a redevelopment commission must: (1) hold a public hearing on the proposed conveyance after proper advertisement, (2) get approval for the proposed conveyance from the governing body of the municipality, and (3) agree with the proposed transferee on the consideration for the conveyance which is not less than the fair value of the property as determined by a committee of three professional real estate appraisers.

[3] With regard to the proposed exchange in the present case, the parties stipulated to the following facts:

The Redevelopment Commission of the City of Durham approved the exchange with the First Baptist Church and adopted Resolution No. 421 (P. T. 8) on February 4, 1970, and this action was confirmed by the Commission at its meeting held on February 4, 1972. Thereafter, the City Council of the City of Durham approved the transaction at its meeting held on the 16th day of October, 1972. Thereafter the Redevelopment Commission of the City of Durham caused to be published the advertisement (P. T. 13) which was, in fact, published in the Durham Morning Herald, a local newspaper published in Durham County, on November 7 and 14, 1972.

It is apparent from the parties' stipulation that the Redevelopment Commission in the present case had already determined to exchange the land at the time it published the advertisement. It is clear from the statute that the advertisement must precede the public hearing on the proposed conveyance.

The parties also stipulated that the appraisals on which the Redevelopment Commission based its determination of fair market value "were made individually and not as a committee." The statute provides that the conveyance shall not be for "less than the fair value of the property agreed upon by a committee of three professional real estate appraisers."

A redevelopment commission, like a municipal corporation, is created by and invested only with such powers as is given to it by statute. If such a commission or municipal corporation fails to

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follow the procedures required by statute it acts outside of its authority and any such act is null and void *ab initio*. *Bagwell v. Brevard*, 267 N.C. 604, 148 S.E. 2d 635 (1966). In the present case, the Redevelopment Commission did not meet the statutory requirements set out in G.S. § 160-464(e)(4); consequently, the purported conveyance of the Markham property by it to the Church was null and void from its inception.

[4] We further hold that G.S. § 160-472 (now G.S. § 160A-522), providing that “[a]ny instrument executed by a commission and purporting to convey any right, title or interest in any property under this Article shall be conclusive evidence of compliance with the provisions of this Article” is not available to revive an instrument that was void from its inception. To allow G.S. § 160-472 to provide the Church with good title in this case would effectively result in nullifying the detailed statutory requirements delineating the authority of redevelopment commissions to dispose of property by public or private sale.

We hold that the trial court erred in concluding that the exchange of property between the Redevelopment Commission and the First Baptist Church “were lawful conveyances” and that “the First Baptist Church, in any event, was a bona fide purchaser; and the provisions of G.S. 160A-522 are applicable.”

With respect to plaintiff’s first cause of action, the judgment is reversed and the cause is remanded to the Superior Court of Durham County for further proceedings not inconsistent with this opinion.

[5] The second question presented by this appeal is whether the Cooperation Agreement entered into between the City of Durham and the Redevelopment Commission pledges the faith and credit of the City in violation of Art. VII, § 6 of the North Carolina Constitution.² Plaintiff argues that the Cooperation Agreement must be interpreted on the date it was entered into by the City and the Redevelopment Commission; that on that date, 25 July 1968, the City assumed an obligation to provide funding for one-third of the cost of the urban renewal plan; that should the City fail to accumulate sufficient non-cash grants-in-aid, it would then be re-

2. Although plaintiff’s complaint, filed on 7 February 1973, alleged that the Cooperation Agreement violated the provisions of Art. V, §§ 2(5) and 4(2) of the North Carolina Constitution, quoted at *id.*, Art. VII, § 6 is the provision that was in effect at the time the Cooperation Agreement was executed.

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quired to spend public funds in order to meet its obligation to provide one-third of the cost of the plan; and that any such spending of public funds would be unconstitutional because it was not for a "necessary" purpose and had not been approved by the voters.

The provisions of North Carolina Constitution, Art. VII, § 6, in force on 25 July 1968 when the Cooperation Agreement was entered into by the Redevelopment Commission and the City, are as follows:

No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose.

This section of the State Constitution forbids the expenditure of tax funds for unnecessary purposes without voter approval and prohibits a pledge of the faith and credit of a municipality to be fulfilled from future receipts regardless of their source. *Yokley v. Clark*, 262 N.C. 218, 136 S.E. 2d 564 (1964).

In *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E. 2d 115 (1964), our Supreme Court was confronted with a similar challenge to the urban redevelopment plan for the City of High Point. The Court held that while taxes could not be levied to fund an urban redevelopment project, the City was not required to submit the approval or disapproval of the project to the voters, provided the City's obligations under the plan could be financed from sources other than taxes. The City had agreed to finance its portion of the cost of the plan through certain local grants-in-aid. The Court held that should it be determined on remand that one or more of the local grants-in-aid were invalid, impossible of accomplishment, or incapable of certainty of accomplishment, the City would be permitted to modify the plan in three possible ways: (1) by substituting valid and feasible grants-in-aid for those found to be invalid or impossible of accomplishment; (2) by reducing the redevelopment area so as to exclude areas requiring objectionable expenditures; or (3) by submitting a workable plan to the electors of the City.

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We think that the Cooperation Agreement in the present case does not constitute an unconstitutional pledge of the City's faith and credit or an unpermitted use of tax revenues. Plaintiff's argument that the estimated grants-in-aid may ultimately be inadequate to meet the City's obligation is without merit since under *Horton v. Redevelopment Commission, supra*, the City is permitted to substitute a valid grant-in-aid for one that is invalid or deficient in some way. In order to prevail, we think plaintiff must show that the City would be unable to meet its obligations under the Cooperation Agreement except by spending public funds for unnecessary purposes. Plaintiff has failed to show either that the City has made any improper expenditures or that should any of the grants-in-aid be insufficient that the City could not substitute a valid grant-in-aid to cover the deficiency.

Even if the plaintiff were able to show that one or more of the local grants-in-aid was somehow deficient, the proper remedy would not be a permanent injunction against completion of the redevelopment plan, as requested by plaintiff, but would be, according to the decision in *Horton v. Redevelopment Commission, supra*, modification of the agreement or submission of the proposed expenditures to the voters. We note that at the time plaintiff commenced his lawsuit in 1973, substantial progress toward completion of the urban redevelopment plan had been made. At the time of trial, the only parts of the plan not completed were one parking facility and storm drainage. "[I]t requires no authority to sustain the proposition that if the act has been committed it cannot be restrained." *Yount v. Setzer*, 155 N.C. 213, 71 S.E. 209 (1911).

With regard to plaintiff's second cause of action, the judgment is affirmed.

Reversed and remanded in part, affirmed in part.

Chief Judge BROCK and Judge MITCHELL concur.

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MONTE M. MILLER, TRUSTEE; JOSEPH O. TAYLOR, TRUSTEE; AND VIRGINIA NATIONAL BANK v. LEMON TREE INN OF WILMINGTON, INC.; JAMES E. BRIDGMAN AND WIFE, GERALDINE R. BRIDGMAN; EDGAR C. BOWLIN AND WIFE, PEGGY O. BOWLIN; THOMAS R. JACKSON AND WIFE, ANGELA JACKSON; O. EDWIN ESVAL AND WIFE, TERESA ESVAL; GODLEY CONSTRUCTION CO., INC.; T. L. SHOUBE, D/B/A T. L. SHOUBE COMPANY; H. W. CARRIKER COMPANY, INC.; R. D. MCCALL, INC., D/B/A HURRICANE FENCE CO.; WINFRED R. ERVIN, TRUSTEE; G. MARLIN EVANS, TRUSTEE; CHARLES G. SIMS; FELIX A. EUFORBIA; AND SOUTH CAROLINA NATIONAL BANK

No. 785SC52

(Filed 19 December 1978)

Laborers' and Materialmen's Liens § 8— acceptance of note—waiver of lien

The acceptance of a note secured by a deed of trust on the identical property subject to the materialman's lien and which matures beyond the period for perfecting the materialman's lien constitutes a waiver of that lien.

APPEAL by defendant, Godley Construction Company, Inc., from *Rouse, Judge*. Judgment entered 17 October 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 October 1978.

This is an action for judicial foreclosure of a deed of trust. The suit was instituted by the trustees under a deed of trust executed by Lemon Tree Inn of Wilmington, Inc. (hereinafter Lemon Tree Inn) to secure a note in the principal amount of \$1,200,000 payable to Virginia National Bank. Plaintiffs prayed that judgment be entered against Lemon Tree Inn and that a commissioner be appointed to sell the property, the conveyance to be subject only to a utility easement and ad valorem taxes for the years 1974 and 1975.

Defendant, Godley Construction Company, Inc. (hereinafter Godley) answered the complaint averring that it was general contractor for construction of the motel, the subject of the foreclosure action, and was entitled to a lien on the property superior to that of the deed of trust to Virginia National Bank.

Plaintiffs moved for summary judgment on the grounds that the pleadings, depositions, answers to interrogatories and admissions of fact presented no material issues of fact and established that plaintiffs were entitled to judgment as a matter of law. Godley filed an affidavit in opposition to the motion averring that

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a material question of fact existed as to whether the bank's lien is in all respects superior to that of the defendant since the deed of trust was not drafted to comply with G.S. Chapter 45, Article 7, relating to instruments securing future advances.

The uncontroverted facts gleaned from the pleadings, affidavits, and interrogatories establish the occurrence and sequence of the following events: The defendant, Godley, a general construction contractor, built for Lemon Tree Inn several motels in other cities and sold to it other motels which Godley had constructed and planned to operate itself. Lemon Tree Inn contracted for construction of an inn to be located in Wilmington. The primary contract called for Godley's services only after all proper land grading had been completed. Although Lemon Tree was originally to supervise the grading itself, the President of Godley agreed to attend to that matter because of Lemon Tree Inn's inexperience in supervising construction projects. Godley hired and compensated subcontractors to prepare the construction site. He was reimbursed for those payments by Lemon Tree Inn. This site preparation commenced on 10 May 1973.

Construction pursuant to the primary contract took place between 13 June 1973 and 25 November 1974. The general practice with respect to compensation for the general contractor was for Godley to bill Lemon Tree Inn for the estimated work done each month. The account statement prepared by Godley indicates that Lemon Tree Inn, in July of 1974, terminated all payments for work done. Godley completed the construction, nevertheless, because of his obligations to the subcontractors.

Lemon Tree Inn executed and delivered to plaintiffs on 30 April 1973, a note and deed of trust covering the subject property to secure the construction loan. The deed was recorded 12 June 1973 in Book 973, at page 758, New Hanover County Registry.

Godley executed on 6 May 1973 a "Contractor's Affidavit of Non-Commencement of Construction" reciting:

"[T]hat as of the date hereof, which is a date subsequent to said date of filing of said mortgage or deed of trust [to Virginia National Bank], no materials or equipment were situated on the said premises and there was nothing whatsoever thereon to evidence the visible commencement of con-

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struction or to visibly evidence the intent to commence construction."

"That this affidavit is made for the purpose of inducing the making of a loan on said property and LAWYERS TITLE INSURANCE CORPORATION to issue its policy or policies insuring the title to said property without exception to claims of mechanics, materialmen and laborers, and said affiant does hereby agree to indemnify and hold LAWYERS TITLE INSURANCE CORPORATION harmless of and from any and all loss, cost, damage and expense of every kind, including Attorneys' fees, which said LAWYERS TITLE INSURANCE CORPORATION shall or may suffer or incur or become liable for under its said policy or policies directly or indirectly, out of such improvements, repairs or other construction on the property hereafter described or on account of any such mechanics' or materialmen's lien or liens or claim or claims, or in connection with its enforcement of its rights under this agreement."

On 25 October 1974, Lemon Tree Inn executed and delivered to Godley its negotiable promissory note in the principal amount of \$450,000 payable 25 October 1975. The note was secured by a deed of trust recorded 28 October 1974 in Book 1016, at page 693, New Hanover County Registry. It was given as "additional security" for the obligation of Lemon Tree Inn and the "consideration was forbearance of Godley Construction Company, Inc., to institute suit".

Godley filed a notice of claim of lien 27 November 1974, which recited that labor and materials were furnished from 16 April 1973 until 25 November 1974, at a value of \$450,000. On 7 May 1975, Godley filed a counterclaim in a suit instituted by Lemon Tree Inn praying that its claim of lien be declared a lien upon the subject property effective 16 April 1973. On 3 May 1976, a voluntary dismissal of the complaint in that action was executed by officers of Lemon Tree Inn while the company was the subject of bankruptcy proceedings. This dismissal was never filed nor signed by representatives of Godley.

From the order of summary judgment ruling that, as a matter of law, plaintiffs' deed of trust is a lien superior to Godley's asserted materialman's lien, defendant, Godley Construction Company, Inc., appeals.

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Murchison, Fox, and Newton, by James C. Fox; and Carr and Swails, by James B. Swails, for plaintiff appellee.

Ervin, Kornfeld & MacNeill, by Winfred R. Ervin and John C. MacNeill, Jr., for defendant appellant Godley Construction Company, Inc.

MORRIS, Chief Judge.

The sole question for decision concerns whether the deed of trust securing Lemon Tree Inn's note to Virginia National Bank is entitled to priority over a materialman's lien claimed by Godley. The parties have asserted numerous theories in support of their contentions. However, the determinative question is whether the note and deed of trust to Godley on 25 October 1975 displaced its rights to a lien on the property. Because we hereinafter so find, it is inconsequential whether the defendant properly perfected its lien or whether the affidavit of non-commencement executed 6 May 1973 effectively waived the right to assert a materialman's lien.

Similarly, because the right to assert the lien was thereby waived, we need not consider defendant's argument that this construction loan deed of trust was in fact an instrument securing future advances and requiring compliance with G.S. 45-67 *et seq.* No security instrument regardless of whether it secures future advances or future obligations, which is otherwise valid, shall be invalidated by failure to comply with the provisions of Article 7, Chapter 45 of the General Statutes. G.S. 45-74. The deed of trust securing the note for construction costs is "otherwise valid", and its failure to comply with the statutory provisions does not operate to destroy its priority over defendant Godley's deed of trust.

The cases are abundant on the topic of the waiver of a materialman's lien. The concept of waiver becomes an issue when there is a taking of additional security, retention of title to materials, execution of an unsecured note for the debt, or execution of a secured note for the same debt. *See generally* 57 C.J.S., Mechanics' Lien § 222 *et seq.*; 53 Am. Jur. 2d, Mechanics' Liens § 289 *et seq.*; Annot., 65 A.L.R. 282 (1930); Annot., 91 A.L.R. 2d 425 (1963). The paucity of recent cases on the topic is probably due to the clarification of the subject in the modern lien statutes

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of many states. Several of these statutes provide that, in the absence of an express agreement to the contrary, the taking of a note does not waive the right to a lien. *See e.g.*, Fla. Stat. Anno. § 713.20 (West); N.D. Cent. Code § 35-27-20; Tenn. Code Ann. § 64-1124. Our recently enacted statute, Article 2, Chapter 44A, does not address the issue of waiver of the right to the mechanics' lien. Therefore, we must turn to case law for guidance. The sole North Carolina decision on the topic of waiver of statutory liens will be discussed *infra*.

The majority of the cases hold that the taking of an unsecured note that matures within the period for the perfection of a materialman's lien does not waive the right to such a lien. *See generally* Annot., 91 A.L.R. 2d at 429 and 441. However, where the unsecured note of the party whose property is subject to the lien matures after the expiration of the period for enforcing the mechanics lien, there are a number of cases finding a waiver of the lien. *Id.* at 445. The reasoning of these cases is as follows:

"The taking of a promissory note for a debt already due suspends the right of action to collect it, and the right of any action to enforce any lien that secures it until the maturity of the note. If its due date is subsequent to the expiration of the time limited by the statute for the commencement of the action to enforce the security, the lien is necessarily renounced, and the payee of the note has estopped himself to enforce it the moment the note is accepted, because he cannot bring an action for that purpose without violating his contract to extend the time of payment of the debt until the note matures." *Westinghouse Air Brake Co. v. Kansas City So. R. Co.*, 137 F. 26, 38 (8th Cir. 1905).

This reasoning has been followed even in states where, by statutory enactment, the mere taking of a note is not deemed a waiver of the right to a lien. Such statutes have repeatedly been construed as referring to the taking of a note that falls due within the time for perfection of the materialman's lien. *Miller-Phiehl Co. v. McCormick*, 170 Wis. 378, 174 N.W. 542 (1919); *Bristol-Goodson Elec. Light and Power Co. v. Bristol Gas, Electric, Light & Power Co.*, 99 Tenn. 371, 42 S.W. 19 (1897).

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Our Supreme Court apparently approved the rule that acceptance of a note maturing beyond the period for perfecting the lien constituted a waiver of that lien. The Court, in *Lumber Co. v. Trading Co.*, 163 N.C. 314, 79 S.E. 627 (1913), commented as follows:

"The second reason assigned by the defendant in support of his motion for judgment of nonsuit—that the acceptance of a note, and its extension, for the amount due for materials, constitute a waiver of the right to a lien—might avail the defendant if it did not appear that the note became due and was unpaid by Campbell before the time for filing the lien expired.

In 27 Cyc., 265, in the article on mechanics' (sic) liens, the author says: 'An extension of the time of payment is not a waiver of the lien, although the lien is lost if the time for payment is extended by agreement beyond the time allowed for enforcing the lien,' and the text is sustained by the decided cases." 163 N.C. at 318.

However, the jurisdictions are not in agreement as to the effect of taking a note secured by a deed of trust on the identical property subject to the lien. 57 C.J.S., Mechanics' Lien § 227(b); 53 Am. Jur. 2d, Mechanics' Liens §§ 302-303. The prevailing view, however, appears to find the determinative factor to be whether the parties intended to extinguish the right to the lien. See the Court's discussion in *Martin v. Becker*, 169 Cal. 301, 146 P. 665 (1915). See e.g., *Portland Bldg. & Loan Ass'n. v. Peck*, 110 Conn. 670, 149 A. 214 (1930); *Meister v. J. Meister, Inc.*, 103 N.J. Eq. 78, 142 A. 312 (1928); see generally Annot., 65 A.L.R. at 303 and 304. Nevertheless, it has been held that the taking of such a mortgage upon the same property necessarily shows the parties intended to waive the lien:

"The agreement for a particular kind of lien upon the same property, to which the mechanics' lien would usually attach, must necessarily be exclusive of all other liens. Such must evidently be the purpose when the agreement is made, though they may not state it in express words, and such would be the construction which others, in dealing with the property, would ordinarily put upon it. In legal effect the contractor waives his lien to obtain another in a different form

....

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. . . Thus, if notes be given and credit be extended beyond the time for bringing the action, the remedy by lien is lost, because it is inconsistent with the statute. So, as in this case, if the bargain is made for a specific lien on the same property, another lien for the same debt by statute must be waived, because of its inconsistency. . . .' " *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 6 P. 2d 25, 29 (1934) (quoting *Weaver and Pennock v. Demuth*, 40 N.J. Law 238). See also *Barrows v. Baughman*, 9 Mich. 213 (1861); *Gorman v. Sagner*, 22 Mo. 137 (1855).

The defendant, Godley, asserts that there is a material question of fact concerning whether he intended to waive the lien. However, the rule is well established that a party opposing a motion for summary judgment is required to produce affidavits setting forth specific facts showing that there is a genuine issue for trial. G.S. 1A-1, Rule 56 (e). Godley's affidavit merely asserts that questions of fact exist concerning the advances pursuant to the construction loan by Virginia National Bank to Lemon Tree Inn. An issue of fact is material if its resolution would prevent the party against whom it is resolved from prevailing in the action or if the fact or facts would constitute a legal defense or affect the result of the action. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Wallpaper Co. v. Peacock & Assoc.*, 38 N.C. App. 144, 247 S.E. 2d 728 (1978). Since it is not determinative of this case whether the deed of trust to Virginia National Bank is an instrument to secure future advances, the questions of fact, which Godley asserts exist, are not material to the resolution of this case.

Godley's own uncontradicted response to interrogatories propounded by plaintiffs establish the purpose for taking the promissory note. Godley described the consideration for the note as follows:

"11. Promissory note was given as additional security for obligation of Lemon Tree Inn of Wilmington, Inc. Consideration was forbearance of Godley Construction Co., Inc., to institute suit."

It is clear that the noteholder was not acquiring *additional* security, but was taking as security under the deed of trust the identical property subject to the asserted lien. The counterclaim

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filed in the prior dispute to perfect the lien and notice of *lis pendens* described the identical property subject to the deed of trust securing Lemon Tree Inn's note to Godley. Therefore, we need not decide whether one who takes security in addition to that security provided by the materialman's lien has waived his right to a lien. *See generally*, 65 A.L.R. at 304-308.

The note and deed of trust to Godley was given as security for the obligations of Lemon Tree Inn at the insistence of Godley. Not only was forbearance to foreclose on the lien consideration for the note and deed of trust, but there is some evidence that the figure \$450,000 was a settlement of the amount due Godley for work and materials which, at the execution of the note, had not been billed to Lemon Tree Inn. Additionally, by becoming promisee of a fixed obligation, Godley became beneficiary of a lien of a higher order. By taking a deed of trust, Godley obtained the contractual remedy of a power of sale under the deed of trust in lieu of the statutory procedures for enforcing the materialman's lien. The advantage of the contractual remedy is not insignificant. Furthermore, whereas the proof of damages upon default on the obligations of a note is simple, a materialman enforcing a lien must prove the value of materials and services benefiting the encumbered land.

These are benefits Godley obtained by taking the note and deed of trust. In exchange therefor the right of foreclosure was suspended until 25 October 1975, the maturity date of the note. Therefore, the materialman's lien was renounced, since an action to enforce the lien would, by statute, have necessarily been instituted prior to the maturity of the note. *See* G.S. 44A-13.

The materialman's lien statutes are based upon equitable principles intended to benefit a general class of persons supplying labor and materials for the improvement of realty. *See Wallpaper Co. v. Peacock & Assoc., supra*. A beneficiary of that statute, who chooses to seek a contractual lien of a higher order, should be held to the contractual remedy of foreclosure which he has chosen to enforce the obligation. He should not be permitted to avoid his express contract and seek the aid of a statutory procedure which is equitable in nature. *Cf. Charles K. Spaulding Logging Co. v. Ryckman, supra*, (the remedy must be sought within the contract of the parties and not under the statute).

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We also note the difficulty a contrary rule could present to those persons relying on county land records. One who finds a deed of trust in the obligor's chain of title covering the identical property as would be subject to a materialman's lien should be entitled to rely on that as settlement of the obligation when it is recorded prior to perfection of the lien and the maturity date of the note extends beyond the period of perfection. *Cf. Gorman v. Sagner*, 22 Mo. 137 (1855) ("third persons who act upon the faith of such conduct should not be deceived and disappointed of their just expectations").

The trial court's granting of plaintiffs' motion for summary judgment against defendant, Godley Construction Company, Inc., is

Affirmed.

Judges VAUGHN and WEBB concur.

AMELIA GAIL WILLIAMS v. CONRAD E. HOLLAND

No. 788DC98

(Filed 19 December 1978)

1. Evidence § 51; Parent and Child § 1.2— blood-grouping test—issue of paternity required

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. G.S. 8-50.1.

2. Constitutional Law § 26.5; Divorce and Alimony § 23— foreign judgment determining paternity—in personam jurisdiction—full faith and credit

In an action to recover arrearages for child support which had been ordered by a Nevada court in a divorce action instituted by plaintiff, defendant was barred by *res judicata* from raising the issue of paternity, since he had properly authorized an attorney to enter a general appearance for him in the Nevada proceeding, which the attorney did; the Nevada court therefore had jurisdiction over the person of defendant; and the adjudication of paternity in plaintiff's Nevada divorce action was entitled to full faith and credit in the courts of this State.

ON writ of certiorari to review order entered by *Jones, Judge*. Order entered 5 December 1977 in District Court, WAYNE County. Heard in the Court of Appeals 25 October 1978.

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This action was initiated by plaintiff on 6 September 1977 when she filed a complaint in District Court alleging: (1) defendant is a resident of North Carolina; (2) plaintiff and defendant were married in 1965 and subsequently were granted a divorce in Nevada on 26 September 1972; (3) one child was born of the parties' marriage; (4) in its divorce decree, the Nevada court ordered defendant to make certain payments for support of the parties' child; and (5) defendant had failed to meet those child support obligations and substantial arrearages had accrued. Plaintiff's prayer for relief sought to have the court order defendant to pay all arrearages and counsel fees incurred by plaintiff in this action. Plaintiff also petitioned the court for modification of the Nevada decree to provide for increased child support payments, alleging that a material change in circumstances had occurred since the Nevada decree had been entered.

On 22 November 1977 defendant filed a motion in which he denied paternity of the child and requested that the court order plaintiff to submit both herself and the child for blood-grouping tests as provided for by G.S. 8-50.1. On 28 November 1977 plaintiff filed a response contending defendant's request for blood-grouping tests was barred by *res judicata* and estoppel. She also requested that the court strike certain portions of defendant's motion from the record. In support of her *res judicata* and estoppel contentions, plaintiff filed an affidavit showing that defendant had filed an answer in the 1972 Nevada divorce proceeding admitting he was the father of the child and subsequently had made substantial child support payments pursuant to the divorce decree. Attached to plaintiff's affidavit was a certified copy of the proceedings in the Nevada divorce action, including the judgment of the court decreeing "that the care, custody, and control of the one minor child born the issue of this marriage, namely: Joelle, born January 4, 1971, be awarded unto the plaintiff herein. . . ."

A hearing was held on 28 November 1977 at which time defendant submitted an affidavit of John Sallstrom, a certified physician's assistant, supporting his contention that blood-grouping tests would show defendant could not possibly be the father of the child. Plaintiff objected to the court's consideration of the affidavit and moved to have it struck from the record. After considering the various motions and documents submitted by the parties, the court ruled that defendant's motion was made

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upon good cause and ordered that plaintiff and the child submit to such tests. The court also granted plaintiff's motion to strike the physician's assistant's affidavit and certain portions of defendant's motion.

Plaintiff sought to appeal from this interlocutory order on grounds that it affected a substantial right and was therefore appealable under G.S. 7A-27(d)(1). Plaintiff also filed a petition for a writ of certiorari with this court, which we allowed on 1 February 1978. Defendant cross-assigned error to that part of the court's order striking portions of his motion and Sallstrom's affidavit.

Dees, Dees, Smith, Powell & Jarrett, by Tommy W. Jarrett for plaintiff.

Barnes, Braswell & Haithcock, by W. Timothy Haithcock for defendant.

BROCK, Chief Judge.

[1] General Statute No. 8-50.1 provides that, "[i]n the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood-grouping test; provided. . . ." In *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972), the court held that this portion of the statute, applicable to civil actions only, is qualified by certain language found in that portion of the statute dealing separately with criminal proceedings. The portion of the statute dealing with criminal proceedings provides, "[i]n the trial of any criminal action or proceedings . . . in which the question of paternity arises, . . . the court before whom the matter may be brought, . . . shall direct and order that the defendant, the mother and the child shall submit to a blood-grouping test; provided. . . ." That the italicized portion of the criminal proceedings section of the statute applies as well to the civil proceedings section of the statute was the holding in *Wright*. Thus, before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. If defendant in this case is barred by *res judicata* or estoppel from raising the issue of paternity as plaintiff contends, the statutorily imposed obligation of the court to order that the parties submit to blood-grouping tests never arose, and it was error for the court to enter such order.

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[2] The parties bring to our attention two cases that have considered the initial question of whether the issue of paternity can be raised by a party to a civil action. In Wright, *supra*, an action brought by the wife for custody and support of the parties' minor children, the husband filed an answer admitting a particular child was born of the parties' marriage and that he owed a duty of support to the child. Subsequently, however, the husband made a motion for a blood-grouping test, which the court granted. When the results of the tests indicated the husband was excluded as the father of the child, the court granted the husband's motion to amend his answer by deleting his admissions of paternity. On appeal the wife contended on the basis of the husband's admissions in his original answer and his previous conduct acknowledging paternity of the child that he should be estopped from raising the issue of paternity. Although acknowledging that "[i]t may be that the putative father of a child conceived or born during wedlock should be estopped to raise the issue of paternity unless he does so within a fixed time," the court rejected the wife's contention on grounds that such a result must be effected by legislative action. *Id.* at 172, 188 S.E. 2d at 326.

Brondum v. Cox, 30 N.C. App. 35, 226 S.E. 2d 193 (1976), *affirmed*, 292 N.C. 192, 232 S.E. 2d 687 (1977), presented substantially the same issue raised in this appeal. In that case, plaintiff-wife brought an action under the Uniform Reciprocal Enforcement of Support Act to obtain an order requiring her ex-husband to support her child. Plaintiff-wife's action was based on the provisions of a Hawaiian divorce decree obtained by her in a proceeding in which her ex-husband made no appearance, although the Hawaii court attempted to exercise personal jurisdiction over him by serving the summons, complaint, and other papers on him by mail in North Carolina, where he was domiciled at the time. Defendant-husband filed an answer to plaintiff-wife's enforcement action denying he was the father of the child and requesting an order for a blood-grouping test. The District Court entered an order finding the Hawaii court had only *in rem* jurisdiction to enter the divorce, child custody, and child support decrees. The court ruled, however, that because the issue of paternity was inextricably bound up in the determination of the above matters, the finding of paternity by the Hawaii court was conclusive and the issue could not be relitigated by defendant-husband in

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plaintiff-wife's enforcement action. From the denial of his motion, defendant-husband appealed to the Court of Appeals, which reversed the judgment of the District Court in an opinion subsequently affirmed by the Supreme Court. The reversal by the appellate court was based on the conclusion that a judgment establishing the status of paternity is one *in personam* and can be rendered only by a court having jurisdiction over the person of the defendant, which the Hawaii court did not have in plaintiff-wife's divorce action. Therefore, the courts of North Carolina were not required to accord full faith and credit to that part of the Hawaiian judgment finding defendant-husband to be the father of plaintiff-wife's child, and defendant-husband was entitled to raise the issue of paternity in plaintiff-wife's enforcement action.

We think the court's holding in *Wright* applies only to the estoppel contentions raised by plaintiff. The factual basis of plaintiff's contention that defendant should be estopped from denying paternity because of a past history of both formal and informal acknowledgment of paternity of the child is substantially the same as that shown in *Wright*. We agree with the Supreme Court's suggestion that, "... the putative father of a child conceived or born during wedlock should [perhaps] be estopped to raise the issue of paternity unless he does so within a fixed time." But we also realize that "... is a matter for consideration by the General Assembly." *Wright*, *supra*, at 172, 188 S.E. 2d at 326.

Brondum, however, is distinguishable from the case under consideration and offers considerable support, albeit in *dictum*, for the disposition we make of this case. The critical, underlying basis for the court's decision in *Brondum* that the adjudication of paternity in the wife's Hawaiian divorce action was not entitled to full faith and credit in the courts of this state was the fact that the Hawaiian court did not have *in personam* jurisdiction over defendant-husband when it granted plaintiff-wife a divorce and adjudicated the issue of paternity. See *Survey of Developments in North Carolina Law, 1977, Civil Procedure*, 56 N.C.L. Rev. 874-76 (1978). In this instance, the Nevada court, which granted plaintiff a divorce, awarded her child custody and support, and decreed the child, Joelle, to be a child born of the marriage, did have jurisdiction over the person of defendant. Among the documents relating to the Nevada proceeding that plaintiff sub-

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mitted to the District Court was a power of attorney properly executed by defendant authorizing a Nevada attorney or his designate to "enter my appearance and represent me in said action at any time after the Complaint is filed to the same extent as if I were personally present. . . ." The record further shows that the attorney so authorized filed an answer on defendant's behalf in which it was admitted that the child, Joelle, was born the issue of the marriage.

"While it is true that no consent can give a court jurisdiction of the subject matter of an action which the court does not possess without such consent, it is equally true that a court may obtain jurisdiction over the person of a party litigant by his consent." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E. 2d 334, 337 (1953). It is also uniformly held that a general appearance by a defendant in a civil suit is sufficient to confer jurisdiction over his person on the court before which he appears. *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951). And a defendant may appear either himself or he may authorize another to appear for him. 5 Am. Jur. 2d, Appearance, § 10, p. 487. In view of the fact that defendant properly authorized an attorney to enter a general appearance for him in the Nevada divorce proceeding and the attorney so authorized filed an answer to plaintiff's complaint in that action, it is clear that the Nevada court had jurisdiction over the person of defendant. Defendant is therefore bound by any order of the Nevada court requiring the assertion of *in personam* jurisdiction.

"The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." *Durfee v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 244, 11 L.Ed. 2d 186, 190 (1963). And in *Sears v. Sears*, 253 N.C. 415, 417, 117 S.E. 2d 7, 9 (1960) our Court noted, "[t]he rule in North Carolina is that a divorce decree rendered in a sister state which is valid and entitled to recognition under the Full Faith and Credit Clause of the United States Constitution, Art. IV, Sec. 1, is *res judicata* as to all matters in issue and deter-

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mined, and a bar to a subsequent suit for the same relief." See also *Garner v. Garner*, 268 N.C. 664, 151 S.E. 2d 553 (1966); *Laughridge v. Lovejoy*, 234 N.C. 663, 68 S.E. 2d 403 (1951); 3 Nelson, *Divorce and Annulment*, § 33.39, pp. 508-9, (2d ed. 1945); Wurfel, *Recognition of Foreign Judgments*, 50 N.C.L. Rev. 21 (1971).

We have not found a decision of the Nevada courts on the question of the *res judicata* effect of a determination of paternity in a divorce action. We are confident, however, that our application of the principles of *res judicata* to this case meets the constitutional requirement that the courts of this state accord to the judgment of a sister state *at least* the *res judicata* effect which the judgment would be accorded in the sister state rendering it. See *Durfee v. Duke*, *supra*.

That a judgment rendered by a court having jurisdiction to do so finding paternity to exist bars the relitigation of that issue by the parties to the original judgment is a well established rule of law in other jurisdictions that have considered the question. *Adoption of Stroope*, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965); *Peck v. Superior Court*, 185 Cal. App. 2d 573, 8 Cal. Rptr. 561 (1960); *Peercy v. Peercy*, 154 Colo. 575, 392 P. 2d 609 (1964); *Sorenson v. Sorenson*, 254 Ia. 817, 119 N.W. 2d 129 (1963); *Dornfeld v. Dornfeld*, 200 App. Div. 38, 192 N.Y.S. 497 (1922); *Time v. Time*, 59 Misc. 2d 912, 300 N.Y.S. 2d 924 (1969); *Arnold v. Arnold*, 207 Okla. 352, 249 P. 2d 734 (1952); *Byrd v. Travellers Insurance Co.*, 275 S.W. 2d 861 (Tex. Civ. App. 1955); *Johns v. Johns*, 64 Wash. 2d 696, 393 P. 2d 948 (1964); *E_____ v. E_____*, 57 Wis. 2d 436, 204 N.W. 2d 503 (1973); *Limberg v. Limberg*, 10 Wis. 2d 63, 102 N.W. 2d 103 (1960). For a discussion of these and other cases that have considered this question, see *Annot.*, 65 A.L.R. 2d, 1381, pp. 1395-96.

E_____ v. E_____, *supra*, is illustrative of the approach taken by most jurisdictions on this issue. In that case the wife obtained a divorce in a proceeding in which her husband appeared and admitted he was the father of her child. The court in its judgment found as a fact that the husband was the father of the child. Seven months after the judgment had been entered, the husband sought by motion to relitigate the issue of paternity. In holding that he was barred from doing so by *res judicata* despite the fact

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that he had not contested paternity in the divorce proceeding, the court observed:

"It is clear not only from the rulings of this court, but also from the numerous other jurisdictions which have considered the question, that the issue of the paternity of minor children becomes *res judicata* between the parties under the original divorce decree, and that it is error for a trial court to subsequently either vacate or modify the original judgment on the grounds that one of the alleged parents, who heretofore stood mute on the question of paternity, has now had a change of heart." *Id.* at 441-42, 204 N.W. 2d at 505.

And in *Peercy v. Peercy*, *supra*, the husband and wife entered into a separation agreement, subsequently incorporated into the parties' divorce decree, wherein the husband acknowledged paternity of the wife's child and agreed to meet support obligations. When he later attempted to raise the issue of paternity in a contempt proceeding brought by the wife, the court held that he was barred from doing so by *res judicata* because the issue of paternity could have been raised, tried, and resolved in the divorce proceeding. The court also held that statutory procedures for modification of judgments did not encompass such a proposed modification.

It is a well established principle in North Carolina as well that a valid judgment is binding on the parties to it "as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, 826 (1940). In *Brondum*, discussed *supra*, Justice Lake observed in *dictum* that the rule established in *Bruton*,

"... has been applied in other jurisdictions to determinations of paternity in divorce proceedings in which the husband and alleged father did not appear or did not contest the paternity of his child. (Citations omitted.) In our opinion this is a correct application of the rule. Thus if the *Hawaii* court had jurisdiction to determine the status of the child in relation to the defendant, its determination thereof would be binding upon the defendant in the courts of this State notwithstanding his failure to appear and to contest the issue of

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paternity." Brondum, *supra*, at 199, 232 S.E. 2d at 691. (Emphasis added.)

The case under consideration is distinguishable from *Brondum* because the Nevada court, as we noted earlier, did have the requisite *in personam* jurisdiction over defendant to determine the issue of paternity. We think it presents exactly the situation adverted to by Justice Lake in *Brondum*, and we hold that defendant is barred by principles of *res judicata* from putting paternity in issue. Since defendant is barred from raising the issue of paternity in this enforcement action by plaintiff, it follows that the court below erred in allowing defendant's motion for blood-grouping tests.

Defendant cross-assigned error to the court's granting of plaintiff's motion to strike the affidavit of the physician's assistant and certain portions of defendant's motion and accompanying affidavit. From our holding that defendant is barred from raising the issue of paternity, it follows that neither the affidavit of the physician's assistant nor defendant's own allegations with respect to non-access during the probable period of conception are relevant to this enforcement action brought by plaintiff. Therefore, we find no error in that portion of the court's order granting plaintiff's motion to strike the irrelevant matter.

That portion of the court's order granting defendant's request for blood-grouping tests is reversed; that portion granting plaintiff's motion to strike is affirmed, and this cause is remanded to the District Court, Wayne County, for further appropriate proceedings.

Affirmed in part; reversed in part; and remanded.

Judges PARKER and HEDRICK concur.

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STATE OF NORTH CAROLINA v. MAUDE MAY CLAY

No. 7815SC671

(Filed 19 December 1978)

Criminal Law § 75.7— custodial interrogation in defendant's home—absence of specific waiver of counsel

In this felonious assault prosecution, defendant's inculpatory statements resulted from custodial interrogation rather than from a general on-the-scene investigation where five police officers went to defendant's home at 1:05 a.m. in answer to a call about a domestic disturbance; defendant told officers at 1:10 a.m. that another person shot the victim; two officers went to the hospital to check on the victim while two other officers stayed in defendant's home; the two officers who went to the hospital returned to defendant's home at 3:10 a.m.; officers interrogated defendant in her home at 3:10 a.m. and defendant stated that she shot the victim; officers were present in defendant's home at all times between 1:05 a.m. and 3:10 a.m. when she made the inculpatory statements; and it is clear that suspicion had focused on defendant at the time of the second interrogation. Therefore, the trial court erred in the admission of defendant's inculpatory statements where defendant did not specifically waive her right to counsel prior to the second interrogation.

Judge MARTIN (Harry C.) dissenting.

APPEAL by defendant from *Martin, Judge (John C.)*. Judgment entered 17 February 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals on 14 November 1978.

Defendant was charged in a proper indictment with assault with a deadly weapon with intent to kill, inflicting serious bodily injury. Upon her plea of not guilty, the State presented evidence tending to show the following:

On 3 September 1977, Nathaniel Cleo Evans went to the defendant's house around 11:00 p.m. and became involved in an altercation precipitated by the defendant's refusal to give him a bowl of cooked okra. Evans testified that he then left the premises but later returned and was invited into the house by the defendant's brother, Verla Turner. Evans further testified that once he was inside the house, the defendant's brother drew a knife on him, and he then proceeded to walk out the back door. As he pushed the door open, he was shot in the leg, suffering serious injury that required hospitalization for over two months.

The Burlington police investigated the shooting and questioned the defendant at 1:15 a.m. and later that same morning at

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3:10 a.m. After a *voir dire* hearing, the trial judge concluded that all of the statements made by defendant to the police "were the result of an on-the-scene investigation rather than a custodial interrogation" and allowed them into evidence. In response to questions of the police, the defendant stated that her brother was attempting to leave the house, that when he opened the door Evans hit him with a chair, that she then shot Evans, and that she would have shot him again if her brother had not restrained her.

The defendant presented evidence tending to show that Evans was drunk at the time of the shooting, that he had pulled a knife on her brother earlier in the night, that he had threatened to kill her earlier in the evening, and that he had a reputation as a violent and fighting man.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. From a judgment imposing a sentence of four to five years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

Lee & Johnson, by Angela R. Bryant, for the defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the admission into evidence of inculpatory statements made by her to Detective G. W. Barrow and Officer O. E. Perry at about 3:10 a.m. Before the defendant's statements were admitted, a *voir dire* hearing was conducted outside the hearing of the jury. The State's evidence on *voir dire*, except where quoted, is summarized below:

Detective G. W. Barrow testified that he had gone to the defendant's home in response to "a call which indicated that there was a domestic problem at the residence." Three other police officers in addition to Detective Barrow and Officer Perry also arrived at the scene. Barrow stated, "I approached Mrs. Clay shortly after I arrived at the residence and saw Mr. Evans injured." He explained, "We did not know that there had been a shooting until we talked with Mrs. Clay. At the first instance we talked to her, there was nobody in the house except Mrs. Clay, the victim

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and police officers." The first statement was made by the defendant to the police officers at 1:10 a.m., about seven or ten minutes after they had arrived at her home. After the defendant was advised of her constitutional rights under the law, "[s]he did not request a lawyer." Barrow stated, "Before I talked to Mrs. Clay, I did not have a suspect in mind. She was not under arrest or in custody." In her first statement to the police, "Mrs. Clay told [Detective Barrow] that Mr. Evans had been shot with a shotgun and that Mr. Turner had shot Mr. Evans. She said that Mr. Turner had already left." After Detective Barrow took the defendant's first statement, he and Officer Perry left to go to the hospital and two other police officers stayed at the house. Barrow testified that prior to his leaving, the defendant "was not under arrest and was not told not to leave her residence." A second statement was taken by Officer Perry from the defendant at approximately 3:10 a.m. at her residence and was tape recorded. Barrow testified that "Mrs. Clay was reminded that she had already been advised of her constitutional rights when she made the second statement. She was asked whether or not she understood those rights and she said that she could take care of herself." The officers did not obtain a written waiver of rights from the defendant, although Detective Barrow stated that "[n]ormally when we take a recorded statement of this type, it is our habit and procedure to get a written waiver of rights." Barrow further testified that "[t]here were police officers at Mrs. Clay's house at all times from 1:05 a.m. until 3:10 a.m. when we took the statement" and that to his knowledge, Mrs. Clay did not leave the premises during that period of time. Barrow noted "I guess she could have left the premises at any time if she had wanted to" and that she "was never threatened or coerced into giving a statement or promised anything." Police obtained from Mr. Turner a waiver of his rights which was signed on a waiver of rights advisory sheet.

The defendant testified, "The house seemed full of policemen. There were a lot of them. More than three." Regarding her first statement to the police, defendant testified, "I talked to some police officers about the shooting before I made the recorded statement. I told the police that Mr. Evans had come in the house kicking and choking me and that I had the gun. Mr. Turner fell back against me, and the gun went off." Mrs. Clay testified, "I

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feel I could have left the house before I made the statement if I had wanted to go, and I don't think they would have tried to stop me." The defendant added, however, "I did not leave the house before I made the recorded statement. Day was breaking when I left home."

Explaining what transpired when she left after the police had recorded her statement, defendant stated, "I did not ask them could I leave, but I went to crank my car. I blew my horn because I was blocked in by their cars and they said I could not get out. But they said I could walk out. So I shut my car door and walked around the house and left them in the back yard searching."

After the *voir dire* hearing, the Court made findings and conclusions, relevant portions of which are quoted below:

[T]hat Officer Barrow advised Mrs. Clay of her constitutional rights under the Miranda decision . . .

Mrs. Clay did not request an attorney, but did not specifically waive an attorney; and that the officers then asked her what had happened, whereupon she replied and gave a voluntary statement to the effect that Mr. Evans had been shot with a shotgun and that Mr. Turner had shot Mr. Evans . . .

[A]gain at approximately 3:10 a.m. Officer Barrow and Officer Perry returned to the Clay residence, having been to the Alamance County Hospital to determine the status of the victim, and upon returning to the Clay residence had in their possession a tape recorder; that during the period of time in which they were absent from the Clay residence the defendant was not in custody or detained in any manner and felt that she could have left the house at any time; that the officers thereafter asked the defendant questions and interrogated the defendant and that she voluntarily answered the questions; that such interrogation was conducted in connection with an on-the-scene investigation of a crime and not as a result of any custodial interrogation and that at the time of the second interrogation and answers given by the defendant, the defendant had not been placed under arrest and had not been told that she could not leave the residence and was in no manner detained even though officers had remained present there at the residence during the entire period of

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absence of Officers Perry and Barrows [sic] and that prior to asking Mrs. Clay any questions at the time of the second interrogation Mrs. Clay was reminded of the rights which she had previously been given at approximately 1:10 a.m.

That although the Miranda warnings were given at the time of the 1:15 a.m. interrogation, such warnings were not required in that such interrogation and statements made by reason thereof were the result of an on-the-scene investigation and that the statements made by the defendant at that time were voluntarily and freely made . . .

That the statements given by the defendant at the 3:10 a.m. interrogation were the result of an on-the-scene investigation rather than a custodial interrogation, the defendant not having been detained, arrested, or taken into custody, and that statements given by the defendant at that time were given voluntarily, freely, and understandingly without duress, coercion, or inducement . . .

Since the trial court found as a fact that the defendant, after being advised of her constitutional rights, did not "specifically waive an attorney," and since waiver of the right to counsel cannot be presumed from a silent record, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), we direct our inquiry to defendant's contention that the trial judge erred in finding and concluding that defendant's inculpatory statements made and recorded at about 3:10 a.m. on 4 September 1977 were not the result of a "custodial interrogation" but were answers made in response to "general on-the-scene questioning."

The United States Supreme Court, in its decision in *Miranda*, set forth certain constitutional rights which must be given to an individual who is the subject of a "custodial interrogation" by police officers. The Supreme Court, in *Miranda*, defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706, accord, *State v. Martin*, 294 N.C. 702, 242 S.E. 2d 762 (1978); *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968). In *Miranda*, the Court noted:

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Our decision is not intended to hamper the traditional function of police officers in investigating crime . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding.

384 U.S. at 477, 86 S.Ct. at 1629, 16 L.Ed. 2d at 725, *accord*, *State v. Blackmon*, *supra*.

In determining whether police questioning constituted a "custodial interrogation" or a "general on-the-scene questioning," courts have considered the following factors as relevant: (1) the nature of the interrogator, *People v. Cesare*, 55 App. Div. 2d 959, 391 N.Y.S. 2d 424 (1977) (four armed police officers); (2) the time and place of the interrogation, *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977) (state patrol office); *Orozcu v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed. 2d 311 (1969) (in defendant's bedroom at 4:00 a.m.); (3) the degree to which suspicion had been focused on the defendant, *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed. 2d 1 (1976); *People v. Glover*, 52 Misc. 2d 520, 276 N.Y.S. 2d 461 (1966); (4) the nature of the interrogation, *State v. Blackmon*, *supra*, (spontaneous response to a neutral question); *Commonwealth v. Sites*, 427 Pa. 486, 235 A. 2d 387 (1967) (questioning designed to elicit a confession); (5) the extent to which defendant was restrained or free to leave, *Orozcu v. Texas*, *supra*; *State v. Martin*, *supra*, (defendant voluntarily went to police station, was not considered a suspect, was not under arrest or restrained in any manner), *State v. Dennis*, 16 Wash. App. 417, 558 P. 2d 297 (1976) (officer stated defendant was free to leave at any time but remained in position where he could restrict defendant's freedom of movement). *See also*, Annot., "What Constitutes 'Custodial Interrogation' Within Rule of *Miranda v. Arizona*," 31 A.L.R. 3d 565 (1970) and cases cited therein.

While none of the above factors standing alone is determinative of the issue, they are all relevant in deciding whether police questioning constitutes a "custodial interrogation." The questioning did occur in the defendant's home. However, we believe that any lessening of "the compelling atmosphere inherent in the process of in-custody interrogation" resulting from defendant being in familiar surroundings is largely vitiated by the fact

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that five police officers went to the defendant's residence and that officers were present in her home at all times until she had made the inculpatory statements. The defendant was questioned on two separate occasions over a period of hours from 1:00 a.m. until after 3:00 a.m. The statements made by the officers that they did not have a suspect in mind prior to their initial questioning of the defendant should be accorded little weight in light of the fact that the officers persisted in their questioning until the defendant made the incriminating statements sometime after 3:00 a.m. The statements made by the defendant were clearly elicited by the police interrogation and could in no sense be considered spontaneous or volunteered responses to neutral questions. The testimony of Detective Barrow that the defendant was free to leave at any time and was not "under arrest," clearly a self-serving statement, is also not determinative of the issue. Defendant was interrogated at her home in the early hours of the morning. Even if the defendant had wanted to leave her home at that hour, she likely had nowhere to go. According to her testimony, the one time she left her house to go to the bathroom the police even followed her into her back yard.

The fact that defendant was allowed to leave after the officers had tape recorded her statement and was not formally charged until around 7:00 a.m., is likewise not dispositive. The defendant testified that when she did attempt to leave in her automobile, the police refused to move their cars which were blocking her and told her that she was free to walk away. It would be highly artificial to limit "custodial interrogation" to questioning that occurs only after a formal arrest. In such a situation, the police would need only to delay the formal arrest of the accused in order to circumvent the constitutional safeguards dictated by *Miranda*.

It is clear that suspicion had focused on the defendant at the time of the second interrogation. Officer Perry and Detective Barrow, after having been told by the defendant that her brother shot Evans, had gone to the hospital "to check the condition of Evans and had returned with a tape recorder" to further their interrogation of the defendant. We think it is significant that the police officers had undertaken to give the defendant her *Miranda* warnings before the 1:10 a.m. interrogation, and reminded her before the second interrogation at 3:10 a.m. that she had already

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been advised of her constitutional rights. Clearly the officers felt that their interrogation on both occasions was custodial and required that the defendant be advised of her rights. It is likely that the police officers believed defendant had sufficiently waived her right to counsel, and it would be unrealistic to suppose that they would be aware that the defendant's waiver of counsel could not be presumed from a silent record.

We are cited by the State to the case of *State v. Parrish*, 32 N.C. App. 636, 233 S.E. 2d 690 (1977) in support of its contention that defendant's inculpatory statement here was the result of a noncustodial interrogation. The cited case held that the defendant had been given his *Miranda* warnings, and that the statements were voluntarily and understandingly made. The language in the case that the defendant's incriminating statement was the result of an on-the-scene investigation and not a custodial interrogation is dictum, and, although correct under the facts of that case, is no support to the State's contentions here. We are likewise advertent to the cases of *Oregon v. Mathiason*, *supra*; *Beckwith v. United States*, *supra*; *State v. Meadows*, *supra*. In our opinion, these cases are clearly distinguishable on the facts, and they merely point out that the question whether an inculpatory statement is the result of a custodial interrogation is to be decided on the presence or absence of certain factors unique to the factual situation in each case.

In our opinion, in the present case the evidence adduced on *voir dire* and the findings of fact made by the trial judge do not support the conclusion that the defendant's inculpatory statements "were the result of an on-the-scene investigation rather than a custodial interrogation." In our opinion, the evidence in the present case demonstrates a "coercive environment" rendering the 3:10 a.m. statements of the defendant inadmissible in the absence of any evidence showing that she affirmatively waived her right to counsel.

We hold the court's error in admitting the 3:10 a.m. inculpatory statement was clearly prejudicial and that the defendant is entitled to a new trial.

Because of our disposition of the case, it is unnecessary to discuss defendant's remaining assignments of error.

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New trial.

Judge MORRIS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

I respectfully dissent. Before turning to the legal question raised on this appeal, there are several statements in the majority opinion (not in the recitation of facts) I feel must be mentioned. They are:

1. "The defendant was questioned on two separate occasions over a period of hours from 1:00 a.m. until after 3:00 a.m." The record shows the officers received a call at approximately 1:05 a.m. to go to the scene. Defendant made her first statement to the officers about 1:10 a.m., some seven to ten minutes after they arrived. This statement was exculpatory. These officers then left to go to the hospital. Although other officers remained at the scene, there is no evidence that anyone other than Barrow and Perry talked with defendant. They returned at approximately 3:10 a.m., when they took the second statement from defendant. So the evidence indicates the officers talked to defendant for a few minutes about 1:10 a.m. and a few minutes about 3:10 a.m. and not "over a period of hours."

2. "[T]hat the officers persisted in their questioning until the defendant made the incriminating statements sometime after 3:00 a.m." The defendant on voir dire testified the police asked her, "Who shot Nate? . . . I told them that I shot Nate. They didn't ask me any more questions after that." This is all the evidence found in the voir dire record concerning the question asked defendant and her reply. Surely this cannot properly be categorized as "persistent" questioning.

3. "Even if the defendant had wanted to leave her home at that hour, she likely had nowhere to go." That the defendant had "nowhere to go" is irrelevant to the question of whether she was in custody at that time.

4. "[T]he police officers had undertaken to give the defendant her *Miranda* warnings . . . Clearly the officers felt that their in-

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terrogation . . . was custodial . . .” The majority seeks to show that *Miranda* warnings were required by showing they were attempted to be given. This is putting the cart before the pony. The giving of *Miranda* warnings does not sustain the conclusion that the interrogation was custodial. It is the custodial interrogation that requires the officers to comply with *Miranda*.

5. “It is clear that suspicion had focused on the defendant at the time of the second interrogation.” The voir dire evidence discloses that at the time of the second questioning, 3:10 a.m., all the officers’ information indicated Turner had shot Evans. No one had given them information that defendant had shot Evans prior to their taking defendant’s second statement. It is submitted that the voir dire record does not sustain the majority’s statement.

The legal question involved in this appeal is whether the court erred in denying defendant’s motion to suppress her inculpatory statement. Two witnesses testified at the voir dire hearing on this motion, the defendant and Officer Barrow. Their testimony is short, and the portions essential to this appeal may be summarized as follows:

DETECTIVE BARROW:

I did not have a suspect in mind before I talked to defendant. She was not under arrest or in custody. I gave her the *Miranda* warnings. [1:10 a.m.] She said Turner shot Evans. She said Turner had left. We had answered a call about a domestic disturbance at defendant’s home. The first statement was taken about 1:10 a.m., some seven to ten minutes after we arrived.

We [Barrow and Perry] went to the hospital and returned about 3:10 a.m. We did not advise her of *Miranda* at that time. She was not under arrest or in custody or being detained in any way. She was never threatened or coerced into giving a statement or promised anything.

There were police officers at the house at all times from 1:10 a.m. to 3:10 a.m. Two other officers stayed there when we went to the hospital. Defendant did not leave during that time. I guess she could have left if she had wanted to. I later talked to Turner about 3:50 a.m. We had no information defendant had shot Evans before the 3:10 statement. We did not tell her not to leave when we went to the hospital.

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DEFENDANT CLAY:

Two cars of police came to the house. John Henry Clapp was in the dining room with me. The police [at 3:10 a.m.] asked me, "Who shot Nate?" I told them I shot Nate. They didn't ask any more questions after that. I left the house after I made the [3:10 a.m.] statement. Day was breaking when I left home. I did not ask them if I could leave. My car was blocked in by the police cars, but they said I could walk out.

I feel I could have left the house before I made the statement if I had wanted to go, and I don't think they would have tried to stop me.

I was not arrested at my house that night. I was not threatened to get me to answer questions. I knew I did not have to talk to the police and that I could have a lawyer.

I had been beaten up and was upset, mad and nervous. But not because of the police. I felt safe then.

I was arrested about 7:00 a.m. that morning.

Based upon the voir dire evidence, the court made findings of fact and conclusions of law. The court concluded as a matter of law that the statements given by defendant were the result of an on-the-scene investigation by the officers, rather than custodial interrogation, and denied the motion to suppress.

Whether a statement made by a defendant is competent as evidence is a question to be determined by the trial judge upon evidence presented to him in the absence of the jury. *State v. Outing*, 255 N.C. 468, 121 S.E. 2d 847 (1961), *cert. denied*, 369 U.S. 807, 7 L.Ed. 2d 555 (1962). Findings of fact made by the trial judge are conclusive if supported by competent evidence in the record. We may not properly set aside or modify those findings if so supported. *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). The trial court's findings of fact are supported by the testimony of Barrow and Clay. These findings support the conclusion that defendant was not in custody when questioned by the officers and such statements by defendant were admissible as evidence. Our Supreme Court has recognized the difference between on-the-scene questioning and custodial interrogation condemned by

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Miranda. *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477 (1968). The test for custodial interrogation is whether defendant has been taken into custody or deprived of freedom of action in any significant way. *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968).

In applying this test to the evidence received on voir dire, the facts clearly support the court's conclusion that defendant was not in custody at the time of the 3:10 a.m. statement and that it was made by defendant freely and voluntarily and understandingly, without duress, coercion, or inducement.

In *People v. Hazel*, 252 Cal. App. 2d 412, 60 Cal. Rptr. 437 (1967), the court held the custody requirement of *Miranda* was to be determined by the reasonable belief or intent of the suspect, rather than that of the officer, where suspect has not been arrested or physically deprived of his freedom of action. The voir dire evidence sustains the result that defendant Clay did not reasonably believe that her freedom of action was restricted. All the evidence is to the contrary.

In *People v. Glover*, 52 Misc. 2d 520, 276 N.Y.S. 2d 461 (1966), the court held one of the criteria for distinguishing on-the-scene questioning and custodial interrogation depended upon the subjective intent of the officer. Does the officer have a reasonable belief that the person he is questioning is a suspect? If during the questioning the officer forms a reasonable belief that the person is a suspect, the questioning becomes custodial interrogation. *Miranda* warnings must be given before questioning may lawfully continue. "But *Miranda* cannot be tortured to 'throw back' to his first fateful answer so as to bring that first answer within the ambit of 'custodial interrogation' as defined in *Miranda*. Nothing in *Miranda*, suggests that it does!" *Id.* a 527, 276 N.Y.S. 2d at 467. The voir dire evidence sustains the conclusion that defendant was not a suspect until after the 3:10 a.m. statement. *State v. Martin*, 294 N.C. 702, 242 S.E. 2d 762 (1978).

An investigation that is focused on the defendant as a suspect does not, in itself, require the application of the principles of *Miranda*. The interrogation must be custodial in nature before the requirements of *Miranda* are necessary. *Beckwith v. United States*, 425 U.S. 341, 48 L.Ed. 2d 1 (1976). (Beckwith was interrogated by I.R.S. officers in a house sometimes occupied by him. The Court held it was not a custodial interrogation and *Miranda*

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not required, even though the investigation had focused on Beckwith.) *Smith v. Commonwealth*, 248 S.E. 2d 135 (1978).

The majority suggests that the presence of police officers in defendant's home created a "compelling atmosphere" or a coercive environment. Defendant, to the contrary, said the presence of the officers did not make her nervous or afraid and that she felt safe. In *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714 (1977), the Court concluded that a mere coercive environment, absent any formal arrest or physical restraint of freedom, was not a custodial interrogation within the meaning of *Miranda*. "[A]ny interview . . . by a police officer will have coercive aspects to it." *Id.* at 495, 50 L.Ed. 2d at 721.

I find this case within the facts and holding in *State v. Meadows*, *supra*. In *Meadows*, police officers received a call a shooting had occurred and went to the scene to investigate. They found the victim there, wounded. The officer asked defendant what had happened and defendant replied, "I shot him." Although this testimony was evidently offered to impeach defendant, the Court's opinion was before *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1 (1971), which approved the use of a confession without *Miranda* warnings to impeach a defendant. Justice Bobbitt (later Chief Justice) based the Court's opinion on the conclusion that defendant was not in custody and that although defendant was a suspect, the question was a part of a general investigation by the officers and not an in-custody interrogation. In *State v. Martin*, *supra*, the facts are analogous to the case at bar. The Court relied on *Mathiason*, *supra*, and held the statements were not a result of custodial interrogation.

I find the evidence on voir dire supports the trial court's conclusion that the defendant's inculpatory statement was not the result of custodial interrogation and was voluntary.

From a reading of the entire charge of the court, defendant's second assignment of error appears to be without merit.

For these reasons, I find no error in the trial.

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STATE OF NORTH CAROLINA v. HARVEY LEE MURCHINSON

No. 7810SC628

(Filed 19 December 1978)

1. Criminal Law § 73.1; Automobiles § 134— unlawful possession of stolen vehicle—provision exculpating police officers—hearsay—harmless error

In a prosecution for unlawful possession of a stolen vehicle, an officer's testimony that he had checked with the Raleigh Police Department and the Wake County Sheriff's Department and determined that defendant was not an officer with either of those departments at the time in question was incompetent hearsay. However, the admission of such testimony was harmless error since the provision of G.S. 20-106 exculpating police officers who possess stolen vehicles in the performance of their duties is an exception to the statute, not an element of the offense of unlawful possession of a stolen vehicle, and since there was no evidence that defendant was a police officer.

2. Automobiles § 134— unlawful possession of stolen vehicle—sufficiency of evidence

There was sufficient evidence that defendant knew or had reason to know that a vehicle was stolen or unlawfully taken to support his conviction for unlawful possession of a stolen vehicle under G.S. 20-106 where the evidence tended to show: a person resembling defendant was seen near the stolen vehicle during the daytime just before it was stolen; defendant was twice seen alone in a car matching the description of the stolen vehicle at a food store; defendant was seen driving a car resembling the stolen vehicle on two separate days near Willow Springs; a black male who identified himself as Robert or Bob Williams was seen walking back and forth from the passenger area to the trunk of the car while it was burning along the side of the same road near Willow Springs; defendant was later found in possession of a registration card for the stolen vehicle; and defendant possessed an identification with the name of Robert Williams.

3. Automobiles § 134— unlawful possession of stolen vehicle—doctrine of possession of recently stolen property

The doctrine of possession of recently stolen goods is, under appropriate circumstances, applicable to justify denial of a motion for nonsuit in a prosecution for unlawful possession of a stolen vehicle.

4. Arson § 1; Property § 4— willful burning of personal property—intent to injure owner

A violation of G.S. 14-66 requires, in addition to the willful and wanton burning of personal property, that the defendant have the specific intent to injure or prejudice the owner of the property, and such intent may not be inferred from the mere act of burning but must be shown from other facts and circumstances present in the case.

5. Criminal Law § 2— meaning of willful and wanton

The words "willful" and "wanton" bear substantially the same meaning when identifying the requisite state of mind for violation of a criminal statute.

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"Willful" means the wrongful doing of an act without justification or excuse, or purposely and deliberately in violation of the law.

6. Arson § 4.2; Property §4— willful burning of personal property—insufficiency of evidence

The State's evidence was insufficient for the jury in a prosecution for unlawful burning of personal property, a stolen automobile, in violation of G.S. 14-66 where it tended to show only the willful burning of the automobile by defendant but failed to show, other than by the act or burning, any intent by defendant to injure or prejudice the owner of the automobile.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 16 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1978.

Defendant was indicted for larceny of a motor vehicle, unlawful possession of a stolen vehicle, and unlawful burning of personal property. The State dismissed the charge of larceny of a motor vehicle. Defendant pled not guilty to the two remaining charges and was convicted by the jury. From entry of judgment on the verdict sentencing the defendant to two consecutive five-year terms, defendant appeals.

Facts necessary for this decision are set out in the opinion below.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Johnson, Gamble and Shearon, by Richard O. Gamble, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant asserts prejudicial error in the admission of testimony, over objection, which he urges was inadmissible hearsay and which, upon admission, violated defendant's right to confront his accusers. He contends that this testimony was the only evidence on a crucial element of the offense of unlawful possession of a stolen vehicle. The statute defining the offense of unlawful possession of a stolen vehicle provides as follows:

"§ 20-106. *Receiving or transferring stolen vehicles.*—Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or

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unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony."

The prosecution, in an effort to prove the negative fact that defendant was not "an officer of the law engaged at the time [of the crime] in the performance of his duty as such officer," questioned an investigating detective. The record discloses the following colloquy:

"Q. Detective Narron have you today checked with people at the Raleigh Police Department to determine whether or not Harvey Lee Murchinson, on the day in question or on the days in question, that is during March of 1977, was a police officer, with the Raleigh Police Department?

A. Yes, sir. I checked.

Q. Was he?

A. He was not.

MR. GAMBLE: Objection to that because he can only know from hearsay, Your Honor.

COURT: Objection is overruled.

EXCEPTION NO. 1

Q. Have you also checked with the Wake County Sheriff's Department?

A. Yes, I have.

Q. And were you able to determine from them whether or not the defendant, Harvey Lee Murchinson, around March of 1977, was a police officer in Wake County?

A. He was not.

MR. GAMBLE: Objection.

COURT: Overruled.

EXCEPTION NO. 2".

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The testimony admitted over objection necessarily was based upon hearsay as that term is defined in North Carolina. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." Stansbury, N.C. Evidence § 138 (Brandis Rev. 1973) at 458. Although hearsay, such evidence in this context is not intrinsically incredible nor weak in probative force. Such "reliable hearsay" is in some contexts admissible. See G.S. 15A-611(b)(2); see generally Stansbury, *supra*, § 139. Nevertheless, this testimony falls within none of the well-recognized exceptions to the hearsay rule in North Carolina.

Despite the incompetence of the admitted evidence, it is a fundamental concept of judicial review that error in the admission of evidence does not entitle a defendant to a new trial unless the error has prejudiced the defendant. Unless the error could have influenced the jury and affected the verdict, it is deemed to be harmless and does not entitle a defendant to a new trial. *Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509 (1962); *Johnson v. Massengill*, 12 N.C. App. 6, 182 S.E. 2d 232 (1971), *aff'd.*, 280 N.C. 376, 186 S.E. 2d 168 (1972).

The evidence complained of could not have affected the verdict of the jury. Whether the defendant was a policeman in the line of duty is not an essential element of the substantive crime. The provision exculpating police officers in the line of duty was apparently placed in the statute out of an abundance of legislative caution. Such a provision may have been thought necessary in light of the fact that the crime charged merely requires possession with knowledge that the vehicle is stolen, not criminal intent. *State v. Abrams*, 29 N.C. App. 144, 223 S.E. 2d 516 (1976). The clause under consideration is an exception to the statute, not an element of the offense. The majority in *State v. Connor*, 142 N.C. 700, 55 S.E. 787 (1906), concluded the rule in this State to be as follows:

"... [W]hen a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted

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cases need not be negative [sic] in the indictment, nor is proof required to be made in the first instance on the part of the prosecution." 142 N.C. at 701, 55 S.E. at 788.

The above decision and dissenting opinions indicate the difficulty in distinguishing between an element of the offense and an exception to the statute. The fact that the evidence is peculiarly within the knowledge of the defendant is an important factor. See *State v. Connor, supra*; *State v. Johnson*, 188 N.C. 591, 125 S.E. 183 (1924). "[T]he rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, 'provided' or 'except'; but rather on the nature, meaning and purpose of the words themselves." *State v. Connor*, 142 N.C. at 702, 55 S.E. at 788. Clearly, as stated above, the purpose of the statute was to exempt law enforcement officers in the performance of their duty. The federal courts have adopted the same rule; i.e., the prosecution need not prove a defendant is not within an exception. See *McKelvey v. United States*, 260 U.S. 353, 43 S.Ct. 132, 67 L.Ed. 301 (1922); *United States v. Paulton*, 540 F. 2d 886 (8th Cir. 1976); *United States v. Chodor*, 479 F. 2d 661 (1st Cir. 1973) (similar statutory exception under 18 U.S.C. § 474); compare *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1974) and *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977).

Therefore, even in the absence of any evidence by the State on this aspect of the crime as defined by statute, the jury could not have found defendant to be an officer of the law. There was no evidence to support such a finding. Because the erroneous admission of hearsay testimony was harmless, defendant's first assignment of error is overruled.

Defendant has excepted to and assigned as error the trial court's denial of his motion for nonsuit on both charges at the conclusion of the State's evidence and renewed at the conclusion of all the evidence. Before addressing defendant's argument we note that the scope of review on a motion for nonsuit is properly a narrow one. The motion is properly denied when the evidence, considered in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn from that evidence, is sufficient as a reasonable basis for the jury's

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finding of defendant's guilt. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978). Therefore, this Court's function is not to weigh the evidence but to determine if there was sufficient evidence which, if believed by the jury, could support a verdict against the defendant.

[2] Defendant argues that there was insufficient evidence to support defendant's conviction for illegal possession of a stolen vehicle under G.S. 20-106. Defendant asserts that the record is devoid of any evidence to indicate that he knew or had reason to know that the vehicle was stolen or unlawfully taken. The evidence, taken in the light most favorable to the State, tends to show: that a person resembling the defendant was seen near the stolen vehicle during the daytime just before it was stolen; he was a tall black male with an Afro hairstyle, a beard, and weighed about 150 pounds; that defendant was twice seen alone in a car matching the description of the stolen vehicle at Mt. Pleasant Food Center; that defendant was seen driving a car resembling the stolen vehicle on two separate days near Willow Springs; that a black male who identified himself as Robert or Bob Williams was seen walking back and forth from the passenger area to the trunk of the stolen car while it was burning along the side of the same road near Willow Springs; that defendant was found later in possession of a registration card for the stolen vehicle; and that defendant possessed an identification with the name of Robert Williams.

The state of mind of a defendant in a criminal action must necessarily be proved through inferences to be drawn from the evidence. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). It is a rare case that such facts are susceptible of direct proof. G.S. 20-106 requires only that the State prove defendant "knew or [had] reason to believe" that the vehicle in his possession was stolen. No felonious intent is required. The purpose of the statute "is to discourage the possession of stolen vehicles by one who knows it is stolen or has reason to believe it is stolen." *State v. Rook*, 26 N.C. App. 33, 35, 215 S.E. 2d 159, 161 (1975). See also *State v. Abrams*, *supra*.

[3] The evidence taken in the light most favorable to the State shows defendant in possession of the stolen vehicle a short time after its theft. Although the larceny charge against defendant

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was dismissed by the State, the State nevertheless relies upon the doctrine of possession of recently stolen goods, applicable in larceny cases, to prove defendant's criminal knowledge. The doctrine recognizes a logical inference of fact, not a true legal presumption, which may be drawn from the evidence. *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976). In the larceny context, the courts have considered the possession of recently stolen goods as evidence sufficient to justify a denial of a motion for judgment of nonsuit where there are no circumstances tending to destroy the efficacy of the inference. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). We think the doctrine is, under appropriate circumstances, similarly applicable to justify a denial of a motion for nonsuit in a case charging illegal possession of a stolen vehicle pursuant to G.S. 20-106. See e.g., *State v. Leonard*, 34 N.C. App. 131, 237 S.E. 2d 347 (1977) (doctrine not applied because of "intervening agency"). Indeed, the inference that the possessor at least knows the vehicle to be a stolen one is stronger than the inference that the possessor is the actual thief. We hold that the inferences drawn from the evidence that tends to establish defendant's possession of the vehicle shortly after its theft are sufficient to withstand defendant's motion for nonsuit.

Defendant also argues that his motion for judgment of nonsuit on the charge of burning of personal property should have been granted because of insufficient evidence that defendant was at the scene of the burning and because there was no evidence of defendant's intent to injure or prejudice the owner of the property. G.S. 14-66 as amended in 1971 provides as follows:

"§ 14-66. *Burning of personal property.*—If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares, merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court."

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The evidence as summarized above indicates the existence of abundant circumstantial evidence that defendant was the person seen at the car while it was being burned. The case of *State v. Simms*, 208 N.C. 459, 181 S.E. 269 (1935), cited by defendant, is clearly distinguishable on its facts due to the strong evidence in this case placing defendant at the scene of the crime. Although the witness could not positively identify defendant in the dark, a black male identified himself at the scene as Robert Williams and one of many identifications found on defendant bore the name Robert Williams. The name Robert Williams was also given to the arresting officer by defendant and it appeared on the arrest sheet. Furthermore, defendant was identified as having been the driver of the vehicle on the same day that it was seen burning.

[4] A violation of G.S. 14-66 requires, in addition to the willful and wanton burning of personal property, that the defendant have the specific intent to injure or prejudice the owner of the property. Where specific intent is not an element of the crime, proof of the commission of the crime may be sufficient to infer intent to cause the natural consequences of the act. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). However, where a specific intent is an element of the crime charged, such intent may not be inferred from the mere act itself, but must be shown from other facts and circumstances present in the case. *Id.*

[5, 6] The words "willful" and "wanton" bear substantially the same meaning when identifying the requisite state of mind for violation of a criminal statute. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). "Willful" means the wrongful doing of an act without justification or excuse, or purposely and deliberately in violation of the law. *State v. Arnold, supra*; see also *State v. Clifton*, 152 N.C. 800, 67 S.E. 751 (1910). The State's evidence is sufficient to withstand a motion for nonsuit on this element of the crime. Nevertheless, the statute further requires proof of intent to injure or prejudice the owner of the vehicle. Other than intent to injury inferable from the act of burning itself, which is a legally impermissible inference as pointed out above, there is no other evidence to prove intent to injure or prejudice the owner of the stolen vehicle.

We are not unaware that the above interpretation of the statute places a significant burden upon the State to prove the

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requisite intent. Nevertheless, the words of the statute are clear as is the law relative to proof of specific intent. If the legislature had deemed it sufficient to proscribe wanton and willful burning of personal property, it was free to do so. *Cf., Watson Seafood & Poultry Co., Inc. v. George W. Thomas, Inc.*, 289 N.C. 7, 220 S.E. 2d 536 (1975); *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961); *State v. Hill*, 31 N.C. App. 733, 230 S.E. 2d 579 (1976). The legislature chose to add the element of intent to injure or prejudice and, until the statute is amended, the State must prove beyond a reasonable doubt such intent. Because there is no evidence other than the act of burning itself, the trial court should have entered the judgment of nonsuit on the charge pursuant to G.S. 14-66.

Because we find the defendant was entitled to a judgment of nonsuit on the charge pursuant to G.S. 14-66, we need not consider defendant's final argument supporting assignments of error Nos. 4 and 5.

As to No. 77-CRS-20787—burning personal property, judgment must be vacated and the charge dismissed.

As to No. 77-CRS-20788—possession of a stolen vehicle, no error.

Judges ARNOLD and ERWIN concur.

GRACE GLADSTEIN v. SOUTH SQUARE ASSOCIATES, A LIMITED PARTNER-
SHIP, AND SAMUEL A. LONGIOTTE

No. 7814SC107

(Filed 19 December 1978)

1. Negligence § 48—entrance to shopping mall—wet floor—fall by plaintiff—summary judgment for defendants improper

In an action to recover for injuries sustained by plaintiff when she slipped and fell in a shopping mall, the trial court improperly entered summary judgment for defendants where plaintiff alleged that the terrazzo floor covering used in the mall was slick when wet and thus unsafe for patrons; defendants placed a mat at the entrance which was insufficient to dry properly patrons' feet; there had been prior slips and falls on the mall floor; the faulty condition

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was known or should have been known to exist; and although defendants generally denied negligence, neither their affidavit nor answer controverted the facts alleged by plaintiff.

2. Rules of Civil Procedure § 15— motion to amend complaint—denial improper

In an action to recover for injuries sustained by plaintiff when she slipped and fell in a shopping mall, the trial court abused its discretion in denying plaintiff's motion to amend the complaint to add a verification and precisely plead proximate cause, though the motion was made on the day the court signed a summary judgment order, since amendment of the complaint would not have been futile; at the time of plaintiff's motion to amend to correct technical defects in her complaint, defendants would have suffered no discernible prejudice; and allowing amendment to correct the technical pleading defects would have facilitated consideration of the action on all the evidence available to the court.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 31 October 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 October 1978.

Plaintiff, upon entering South Square Mall in Durham on a rainy 30 December 1975 day, slipped and fell causing what plaintiff alleges to be permanent and total disability. Plaintiff instituted this action alleging that the defendants were negligent in failing to provide a safe entranceway into the mall. Plaintiff alleged the defendants were negligent in the following respects: (a) providing an unsafe floor covering, (b) providing a walkway which because of improper construction retained water rather than drained it, (c) maintained a leaking walkway cover allowing water to accumulate, (d) water was allowed to accumulate in a puddle immediately outside the entranceway, (e) a mat placed at the entrance to the mall was insufficient to dry patrons' feet on rainy days, and (f) that the faulty conditions were known or should have been known to the defendants.

Defendants answered the complaint denying negligence and averring contributory negligence on the part of plaintiff. On 4 May 1977, defendants filed a motion for summary judgment supported by an affidavit of the general manager of South Square Mall and certain exhibits. Plaintiff offered in response to the motion her unverified complaint, her deposition, and answers to interrogatories propounded to defendants. The motion was heard and judgment entered 31 October 1977. The order was filed dismissing the action with prejudice on 7 November 1977 based upon the trial court's conclusions that "there is no genuine issue

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as to any material fact" and that "plaintiff's evidence taken in the light most favorable to the plaintiff fails to show that the defendant was in anywise negligent or failed to exercise ordinary care to maintain its premises in a reasonably safe condition for its customers."

On 7 November 1977 plaintiff moved for leave to amend the complaint to add a verification and to allow plaintiff to allege more specifically the matter of the proximate cause of the injury. The same day, plaintiff filed a motion to set aside the summary judgment and a motion for voluntary dismissal without prejudice. All three motions were denied.

From the granting of summary judgment for defendants and the denial of plaintiff's three motions, plaintiff appeals.

James B. Maxwell for plaintiff appellant.

Newsome, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon, by O. William Faison, for defendant appellees.

MORRIS, Chief Judge.

Plaintiff's first assignment of error places before this Court the propriety of the trial court's entry of summary judgment against plaintiff in this action based upon negligence. It is well settled that summary judgment is properly granted only in the absence of a genuine issue of material fact. G.S. 1A-1, Rule 56. An issue is "material" only if its resolution would prevent the party against whom it is resolved from prevailing or the fact alleged would affect the result of the action, or constitute a legal defense. The issue is "genuine" if it is supported by substantial evidence. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). Nevertheless, it has often been said by the courts of this and many other jurisdictions that only in exceptional cases involving the question of negligence or reasonable care will summary judgment be an appropriate procedure to resolve the controversy. See *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975); *Savings and Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Edwards v. Means*, 36 N.C. App. 122, 243 S.E. 2d 161 (1978); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971), cert. den., 279 N.C. 395, 183 S.E. 2d 243 (1971); *Pridgen v. Hughes*, 9

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N.C. App. 635, 177 S.E. 2d 425 (1970); *see generally* 10 Wright and Miller, Federal Practice and Procedure: Civil § 2729. The propriety of summary judgment does not always revolve around the elusive distinction between questions of fact and law. Although there may be no question of fact, when the facts are such that reasonable men could differ on the issue of negligence courts have generally considered summary judgment improper. *See Croley v. Matson Navigation Co.*, 434 F. 2d 73 (5th Cir. 1970), *reh. den.*, 439 F. 2d 788 (5th Cir. 1971). Judge Parker for this Court explained:

"This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries." *Robinson v. McMahan*, 11 N.C. App. at 280, 181 S.E. 2d at 150; *see also Edwards v. Means*, *supra*.

The jury has generally been recognized as being uniquely competent to apply the reasonable man standard. *See generally* Prosser, Torts § 37 at 207 (4th Ed. 1971). Because of the peculiarly elusive nature of the term "negligence", the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case. This is so even though in this State "[w]hat is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does nor does not exist." *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 457, 461 (1972).

The appropriate use of the summary judgment procedure requires the courts to strike a delicate balance between the equally distasteful practices of trying cases upon affidavits or requiring a trial in cases that are destined for disposition by a trial court's granting of a directed verdict. The courts, not without some criticism, have often refused to grant summary judgment in negligence cases even where a directed verdict may appear likely. Addressing himself to this issue, Chief Judge Parker of the Fourth Circuit commented:

"It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct

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a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented." *Pierce v. Ford Motor Company*, 190 F. 2d 910, 915 (4th Cir. 1951), cert. den., 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951).

These remarks are typical of the treatment of the summary judgment procedure in personal injury litigation. See generally 10 Wright and Miller, *supra*.

It was said by this Court that when the moving party presented materials which would require a directed verdict at trial, he was entitled to summary judgment unless the opposing party established some triable issue of fact. *Pridgen v. Hughes, supra*. However, that case presented no facts upon which reasonable men could differ. Plaintiff in that case relied entirely upon her allegations "that the defendants were negligent in placing the throw rug over the recently waxed floor which would slip upon being stepped on and in failing to warn plaintiff of the dangerous condition thereby created." The trial court's dismissal of the action through entry of summary judgment was affirmed. Essentially the facts alleged were insufficient to establish a cause of action in negligence. The fact that a floor is waxed does not constitute evidence of negligence in North Carolina. *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180 (1949).

Defendants have cited authority which they assert would entitle them to a directed verdict if the case were sent to trial. One of the primary authorities on "slip and fall cases" in North Carolina appears to be the case of *Dawson v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831 (1965). Nonsuit was entered against the plaintiff where the only evidence of negligence was that she slipped on a damp or wet floor. There was no evidence that the prudent storekeeper would use mats to dry feet near the entranceway nor that the defendant by the exercise of reasonable care should have known of the wetness and avoided the danger of injury by removing the water or warning plaintiff of its existence. That decision was followed by this Court in *Gaskill v. A. and P. Tea Co.*, 6 N.C.

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App. 690, 171 S.E. 2d 95 (1969). In that case judgment of nonsuit was affirmed where the only evidence was that water had accumulated on a tile floor just inside the entranceway. There was "no evidence that the floor was slippery when wet, and no evidence that defendant failed to follow usual precautionary procedures customarily employed by it in rainy weather." 6 N.C. App. at 695-696, 171 S.E. 2d at 98. The case of *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56 (1960), was distinguished because of evidence in that case tending to show that the floor was slippery when wet, that mats were generally used on rainy days, and that water which accumulated was usually mopped with a dry mop.

[1] Plaintiff in the case *sub judice* alleged, *inter alia*, that the terrazzo floor covering used in the mall was slick when wet and thus unsafe for patrons; that defendants placed a mat at the entrance which was insufficient to properly dry patrons' feet; that there had been prior slips and falls on the mall floor; and that the faulty condition was known or should have been known to exist. Although defendants generally denied negligence, neither the affidavit nor answer controverted the facts alleged by plaintiff. Defendants merely stated upon affidavit of the general manager of the shopping center that the terrazzo flooring is commonly used in other area malls—he did not deny it was slick when wet. Although he asserted there were no falls under substantially similar circumstances, the record of accident reports in the mall indicates other incidents of slips and falls. The affidavit did not assert that the mats were sufficient to dry patrons' feet, it merely provided pictures of the type mats used.

Although the material facts of the case are not in dispute, there is sufficient evidence gleaned from the record upon which reasonable men could differ concerning whether these defendants exercised reasonable care. We hold that plaintiff is entitled to have the issue of the reasonableness of these defendants' conduct presented at trial. We express no opinion concerning the strength of the evidence.

[2] Summary judgment was entered by the court orally 31 October 1977 and the order of summary judgment was signed and filed 7 November 1977. On the day the order was signed plaintiff filed (1) a motion to set aside the entry of judgment pursuant to

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G.S. 1A-1, Rules 59 and 60; (2) a motion for voluntary dismissal without prejudice pursuant to Rule 41(a); and (3) a motion to amend the complaint pursuant to Rule 15. Plaintiff assigns as error the denial of each of these motions. Because we have hereinabove concluded that entry of summary judgment was improper, we need only discuss the motion to amend.

G.S. 1A-1, Rule 15(a) mandates that leave to amend shall be granted freely when justice so requires. The motion to amend is properly addressed to the discretion of the trial court who must weigh the motion in light of the attendant circumstances. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119 (1978). There is no time limit under G.S. 1A-1, Rule 15 within which a party must move to amend. Courts in the absence of reasonable justification for delay have refused to grant leave to amend after the entry of summary judgment. See e.g., *Universe Tankships, Inc. v. United States*, 528 F. 2d 73 (3d Cir. 1975) (different theory of recovery in amendment); *Freeman v. Continental Gin Co.*, 381 F. 2d 459 (5th Cir. 1967), *reh. den.*, 384 F. 2d 365 (5th Cir. 1967) (amendment proffered more than 8 months after entry of summary judgment); *Carroll v. Pittsburgh Steel Co.*, 103 F. Supp. 788 (D.C. Pa. 1952) (amendment proffered 22 months after motion for summary judgment was filed); see generally Anno., 4 A.L.R. Fed. 123. However, at the time of plaintiff's motion to amend to correct technical defects in her complaint, defendant would have suffered no discernible prejudice. Allowing amendment to correct the technical pleading defects under G.S. 1A-1, Rule 56(e) would have facilitated consideration of the action on all the evidence available to the court. The United States Supreme Court's comments on the appropriateness of the denial of a motion to vacate along with a motion for leave to amend the pleadings is instructive:

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson* 355 US 41, 48, 2 L ed 2d 80, 86, 78 S Ct 99.

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* * *

Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. *See generally*, 3 Moore, Federal Practice (2d ed 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed. 2d 222, 225-226 (1962); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978).

The federal rule and G.S. 1A-1, Rule 15 are in relevant part identical as are the policies behind our rules to insure, so far as is just to the opposing party, that every case be decided on its merits.

Based upon the facts as alleged in the original complaint and more precisely alleged in the tendered amended complaint, as well as the other evidence in the record, the plaintiff has sufficient evidence to present a prima facie case of negligence. Amendment of the complaint to add a verification and precisely plead proximate causation would, therefore, not be futile.

The trial court's entry of summary judgment is reversed, the order denying the motion to amend is vacated, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

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STATE OF NORTH CAROLINA v. RICHARD M. JOHNSTON, JR. AND HARRY
LEE BOWMAN

No. 7817SC582

(Filed 19 December 1978)

1. Conspiracy § 4.1; Larceny § 4; Receiving Stolen Goods § 2— conspiracy to steal in another state—receiving stolen goods—indictments—failure to allege larceny was felony in other state

In indictments charging felonious conspiracy to steal a trailer loaded with tobacco (total value of \$57,400) from its owner in Virginia and felonious receiving of the stolen tobacco, it was not necessary to allege that the larceny of the property was a felony in Virginia, since the law of North Carolina determined whether the conspiracy entered in this State and receiving which occurred in this State constituted felonies. Even if it were relevant to determine whether the larceny was a felony in Virginia, this was a question of law for the trial court, which could take judicial notice of the laws of Virginia.

2. Criminal Law §§ 74.3, 92.5— statements by accomplices implicating defendants—admission for corroboration—denial of severance

Extrajudicial statements made by accomplices implicating defendants were properly admitted for the purpose of corroborating the testimony of the accomplices, since the accomplices were subject to cross-examination by defendants. Therefore, the trial court did not err in the denial of defendants' motions for separate trials pursuant to G.S. 15A-927(c)(1).

APPEAL by defendants from *Kivett, Judge*. Judgments entered 27 January 1978 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals at Winston-Salem on 14 November 1978.

Defendants Johnston and Bowman were convicted, as charged, of conspiracy to steal a trailer (value \$5,000) and load of tobacco (value \$52,400), and defendant Johnston was convicted also of receiving the stolen tobacco. Both defendants appeal from judgments imposing imprisonment.

The State's evidence tended to show that on 4 October 1976 a Fruehauf trailer owned by J. Flint Flemming, Inc., loaded with tobacco owned by Debrell Bros., Inc., was missing from the Debrell parking lot. It was on the lot on Saturday, 2 October 1976, and discovered to be missing on the following Monday. On the same Monday the missing trailer was found abandoned and empty at a truck stop near Greensboro.

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State's witness Rufus Whitaker testified that on Sunday 3 October 1976, he, defendant Bowman, and three other persons planned to steal a trailer loaded with tobacco; they drove to Danville, Virginia, stole the trailer from J. Flint Flemming, Inc., hitched it to a trailer loaded with tobacco on the lot of Debrell Bros., Inc., and drove to a farm outside Greensboro where they were met by defendant Johnston and Oscar Lee Hooper; that all seven of them spent three hours unloading the tobacco; that he, defendant Bowman and their three companions were paid approximately \$500 each by Hooper and Johnston; and that they then abandoned the empty trailer at a truck stop near Greensboro.

Oscar Hooper, also a witness for the State, testified that defendant Johnston offered to get him some "hot" tobacco and Hooper accepted; that defendant Johnston and three other people arrived at Hooper's farm near Greensboro with the trailer load of tobacco; that they unloaded it; and that he later sold the tobacco and split the proceeds with Johnston.

S.B.I. Agent Terry Johnson corroborated the testimony of Whitaker and Hooper by submitting in-custody statements made by both.

Defendant Johnston presented character evidence and testified that Hooper called him about 12:30 a.m. on 3 October 1976 and asked to borrow his truck; that he drove to Hooper's farm, helped several people unload tobacco from a large trailer; and that he did not know the tobacco was stolen and never received any money from Hooper.

Hooper testified that he did not call Johnston; that Johnston called him to tell him that he had a load of tobacco for him.

Attorney General Edmisten by Assistant Attorneys General Roy A. Giles, Jr. and Nonnie F. Midgett for the State.

Robert S. Cahoon for defendant appellant, Richard M. Johnston, Jr.; and C. Orville Light for defendant appellant, Harry Lee Bowman.

CLARK, Judge.

[1] Defendants assign error in the denial of their motions to quash the indictments, contending that the three indictments

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were fatally defective because they do not allege that the theft of the property was a felony in the State of Virginia.

We treat these assignments of error together. All indictments allege the essential elements of the crimes charged. An indictment is sufficient if it charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense. 7 Strong's N.C. Index 3d, Indictment and Warrant, § 9.

It is not necessary that an indictment for conspiracy describe the subject crime with legal and technical accuracy. *State v. Terrell*, 256 N.C. 232, 123 S.E. 2d 469 (1962); *State v. Blanton*, 227 N.C. 517, 42 S.E. 2d 663 (1947). And in the case *sub judice* it was not necessary that the conspiracy indictments aver that larceny of the described property and stated value was a felony in Virginia. The law of North Carolina, not the law of Virginia, determines whether the charged conspiracy was a felony. The charge was brought in this State, and the evidence for the State tends to show that the conspiracy to steal was entered into by the defendants in this State. Thus, the crime in its entirety was committed in this State, where the larceny of goods in excess of \$200.00 is a felony (G.S. 14-70, G.S. 14-72), and a conspiracy to commit a felony is a felony. 3 Strong's N.C. Index 3d, Conspiracy, § 3.2. Under these circumstances it is immaterial that the larceny offense was actually committed in Virginia.

It was not required that the indictment for receiving stolen goods allege that the larceny constituted a felony in Virginia. It alleged that the crime was committed in Rockingham County, and the evidence for the State tended to so show. Thus, the law of this State controls on the question of whether the crime in question was a felony or a misdemeanor. In this State the larceny of property having a value in excess of \$200.00 is a felony, and the offense of receiving stolen goods having a value in excess of \$200.00 is a felony. G.S. 14-71, G.S. 14-72.

We conclude that the three indictments are proper in form, sufficiently meet legal requirements, and the trial court did not err in denying the motions to quash. If, *arguendo*, it was relevant to determine whether the larceny was a felony in Virginia, this was a question of law for the trial court, which could take judicial

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notice of the laws of other states. G.S. 8-4. The Code of Virginia, Title 18.2-95(2) provides that the larceny of goods or chattels of the value of \$100 or more constitutes the felony of grand larceny. The alleged value of the property described in all three indictments was substantially above the felony value prescribed by the statutes of Virginia and North Carolina. All the evidence tended to show the value of the property to be as alleged in the indictments. The value of the property was not a contested issue. Under these circumstances the trial court was not required to instruct, or to inform, the jury about the Virginia larceny statute.

[2] Next, defendants assign error by the trial court in allowing the State's motion to consolidate the cases for trial and in denying defendants' motions to sever. Defendants argue that the extrajudicial statements of accomplices implicating them were improperly admitted into evidence and they rely on G.S. 15A-927(c)(1), which provides:

"(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.—

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

- a. A joint trial at which the statement is not admitted into evidence; or
- b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
- c. A separate trial of the objecting defendant."

G.S. 15A-927(c)(1) codifies substantially the decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand.

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In the case *sub judice* the extrajudicial statements made by the accomplices implicating the defendants were admitted at trial for the purpose of corroborating the testimony of the accomplices. Since the accomplices testified and were subject to cross-examination by defendants, the *Bruton* rule and G.S. 15A-927(c)(1) do not apply. See *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Moles*, 17 N.C. App. 664, 195 S.E. 2d 352 (1973). This assignment of error by the defendants is without merit.

We have carefully examined the other assignments of error, which relate primarily to admissibility of evidence and the charge of the court, in light of the rule that a new trial will be granted only if the error is prejudicial and not mere technical error which could not have affected the result. G.S. 15A-1443(a); *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976).

The State's evidence, which included the corroborated testimony of two accomplices, is substantial, if not overwhelming. We find that defendants had a fair trial free from prejudicial error.

No error.

Judges MITCHELL and WEBB concur.

NANCY H. SIDERS v. LARRY WAYNE GIBBS

No. 7814SC155

(Filed 19 December 1978)

1. Automobiles § 95.2; Negligence § 7— willful and wanton negligence—negligence imputed to passenger-owner—no bar to recovery

Even though plaintiff who was a passenger in her own vehicle would ordinarily be barred from any recovery against defendant who struck plaintiff's vehicle because of the imputed contributory negligence of the driver of her vehicle, plaintiff could nevertheless recover if she could show willful and wanton negligence on the part of the defendant.

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2. Negligence § 7— willful and wanton negligence defined

The concept of willful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct; willful negligence arises from the tortfeasor's willful breach of a duty arising by operation of law, while wanton negligence arises from an act done of wicked purpose or done needlessly which manifests a reckless indifference to the rights of others.

3. Automobiles § 91.3— drunk driver —willful and wanton negligence —sufficiency of evidence

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, evidence was sufficient to require submission to the jury on the issue of willful and wanton negligence where it tended to show that the collision occurred at night in a 35 mph zone along a street which had a level, smooth, dry surface; defendant was travelling between 60 and 80 mph in the westbound lane and struck plaintiff's vehicle in the eastbound lane; there was testimony that, shortly before the collision, defendant was so drunk that he kept falling against his car; because of alcoholic consumption, defendant's speech was noticeably affected and he had difficulty keeping his eyes open while talking; and defendant was told that he was too drunk to drive.

APPEAL by plaintiff from *Hobgood, Judge*. Judgment entered 23 August 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 November 1978.

This action arose out of an automobile collision which occurred on 7 April 1974 at approximately 9:05 p.m. on Green Street in Durham. Plaintiff, now Nancy Siders Harris, was a passenger in her own automobile which, with her permission, was being driven by Ralph L. Young. She was seated in the back seat on the driver's side. Young stopped to pick up Gloria Hamacher Anthony on the corner of Green Street and Ninth Street and then proceeded westward on Green Street. Before reaching the intersection of Green Street and Virgie Street, Young attempted a three-point turn in the street to enable him to reverse his direction and drive eastward on Green Street. Before the turn was completed, plaintiff's car was struck on the driver's side by defendant's car, causing severe damage to each vehicle and personal injury to the plaintiff.

At trial, defendant Gibbs moved for a directed verdict at the close of plaintiff's evidence on the grounds of contributory negligence imputed to plaintiff as the owner of the automobile being driven by Ralph L. Young. The motion was allowed and judgment was entered against the plaintiff. From the entry of judgment granting a directed verdict plaintiff appeals.

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Other facts necessary for decision are summarized in the opinion below.

Grover C. McCain, Jr., for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

MORRIS, Chief Judge.

This appeal brings this case before the Court for the fourth time.¹ For consideration now is whether there was sufficient evidence of willful and wanton negligent conduct on the part of defendant to carry the case to the jury and survive defendant's motion for directed verdict. The question of whether the driver of plaintiff's automobile was negligent in attempting a three-point turn on Green Street is not before us. Furthermore, plaintiff does not contend that it is error in this case to impute the negligence of the driver to the plaintiff because of her status as a passenger in her own car. This principle of imputed negligence arises from the rebuttable legal presumption that, in the absence of evidence to the contrary, the owner/passenger maintains the right to control and direct the operation of the automobile. *Randall v. Rogers*, 262 N.C. 544, 138 S.E. 2d 248 (1964).

[1] Therefore, plaintiff ordinarily would be barred from any recovery against defendant because of the imputed negligence of the driver. *Hearne v. Smith*, 23 N.C. App. 111, 208 S.E. 2d 268 (1974), *cert. den.*, 286 N.C. 211, 209 S.E. 2d 315 (1974). Nevertheless, the established rule allows recovery where plaintiff is able to show willful and wanton negligence on the part of defendant. *Fry v. Utilities Co.*, 183 N.C. 281, 111 S.E. 354 (1922).

It is a fundamental proposition that in ruling upon a motion by defendant for a directed verdict the court must take the plaintiff's evidence as true and consider it in the light most favorable to the plaintiff. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977); *Oliver v. Royall*, 36 N.C. App. 239, 243 S.E. 2d 436 (1978). Therefore, the record must be carefully scrutinized to determine whether there is evidence which, if believed by the jury and thereby accorded full credibility, would establish facts sufficient

1. See previous opinions: *Siders v. Gibbs*, 31 N.C. App. 481, 229 S.E. 2d 811 (1976); *Siders v. Gibbs*, 29 N.C. App. 540, 225 S.E. 2d 133 (1976); and *Siders v. Gibbs*, 26 N.C. App. 333, 215 S.E. 2d 813 (1975).

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to constitute willful and wanton negligence. If the facts are such that reasonable men could differ upon whether the negligence amounted to willful and wanton conduct, the question is generally preserved for the jury to resolve. *See generally* 1 Blashfield Automobile Law and Practice § 67.5; *Cf. Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971) (negligence generally question for jury).

[2] The concept of willful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct. The state of mind of the actor responsible for willful and wanton negligence has been described by a leading commentator as lying within the penumbra of what is called "quasi intent". Prosser, Torts § 34 (4th Ed.). Although the terms "willful" and "wanton" are commonly used conjunctively to describe negligence of an aggravated nature, our courts have attempted to distinguish the concepts. *See e.g., Wagoner v. R.R.*, 238 N.C. 162, 77 S.E. 2d 701 (1953).

A most helpful discussion of the concepts of "willful" negligence and "wanton" negligence can be found in *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929), an appeal from a judgment which provided for execution against the person of the defendant/judgment debtor. Execution against the person can issue where the judgment is supported by pleadings and evidence sufficient to find that the tort was willfully committed. The Court summarized the law of willful negligence as follows:

"An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitener*, 93 N.C., 590; *S. v. Lumber Co.*, 153 N.C., 610), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson*, *supra*. 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.' Thompson on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R.R.*, 149 N.C., 169." 197 N.C. at 191, 148 S.E. at 37.

The Court was concerned with the subtle distinction which must be drawn between willful negligence and an intentional tort.

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Willful negligence arises from the tort-feasor's willful breach of a duty arising by operation of law. *Id.* The tort-feasor must have a deliberate purpose not to discharge a legal duty necessary to the safety of the person or property of another. *Wagoner v. R.R.*, *supra*; Thompson on Negligence § 20 *et seq.* (2d Ed.). This willful and deliberate purpose not to discharge a duty differs crucially for our purposes from the willful and deliberate purpose to inflict injury—the latter amounting to an intentional tort. *Foster v. Hyman*, *supra*. The *Foster* case has recently been quoted at length and cited with apparent approval by our Supreme Court in *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971).

Some confusion in the application of this distinction arises because of language in our Supreme Court's decision in *Wagoner v. R.R.*, *supra*, which was quoted by this Court in *Hughes v. Lundstrum*, 5 N.C. App. 345, 168 S.E. 2d 686 (1969). To the extent that decision requires that willful conduct include an intent to inflict injury, it is apparent that it must be read to refer to "constructive intent" as discussed in *Foster v. Hyman*, *supra*; see also *Ballew v. R.R.*, 186 N.C. 704, 120 S.E. 334 (1923). Otherwise, "willful negligence" becomes a self-contradictory term. Such contradiction in terms has been recognized by some other jurisdictions. See *Kelly v. Malott*, 135 F. 74 (7th Cir. 1905); *Michels v. Boruta*, 122 S.W. 2d 216 (Tex. Civ. App. 1938). "[T]he idea of negligence is eliminated only when the *injury* or *damage* is intentional. *Ballew v. R.R.*, 186 N.C., 704, 706." *Foster v. Hyman*, 197 N.C. at 191, 148 S.E. at 38.

The application of the concept of wanton conduct has presented less difficulty to the courts. "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* (quoted in *Wagoner v. R.R.*, *supra*). The Court in *Wagoner v. R.R.*, *supra*, made the following observation:

" 'We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another.' (Citations omitted.)" 238 N.C. at 168, 77 S.E. 2d at 706.

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We now apply these principles to the evidence before us to determine whether plaintiff produced evidence which, if believed by the jury, could support a finding that defendant was guilty of willful and wanton negligence.

Plaintiff, in arguing that there was sufficient evidence to go to the jury on the issue of willful and wanton negligence, cites *Brewer v. Harris*, *supra*, and *Pearce v. Barham*, 271 N.C. 285, 156 S.E. 2d 290 (1967), in support of her contentions. Defendant argues those cases are distinguishable and contends that this Court's decision in *Hughes v. Lundstrum*, *supra*, is controlling. Because the facts of each case are determinative, it is appropriate to summarize briefly the facts of those cases, applying the concept of willful and wanton negligence.

In *Brewer v. Harris*, *supra*, the Supreme Court, in affirming this Court, held that there was sufficient evidence to go to the jury on the issue of willful and wanton conduct. The case arose out of a collision involving a 1967 Pontiac operated by James Miller and a 1968 Corvette owned and operated by one Rudisill. There were two passengers in the Rudisill automobile. Passenger Brewer was killed; passenger Carroll suffered personal injury. The evidence tended to show that the driver Rudisill had a .31% alcohol content in his blood; that after stopping for a traffic light he "kicked it" and approached a curve at "well over a hundred"; that a passenger warned him two or three times to slow down; that the car left its lane of traffic and struck a telephone pole on the left side of the car; and that the final impact was a head-on collision with another vehicle which was travelling in the proper traffic lane.

Again in *Pearce v. Barham*, *supra*, the Court found there was sufficient evidence of both willful and wanton conduct. The evidence in that case indicated that defendant was "driving in a drizzling rain, with slick tires, upgrade, at a speed of ninety miles an hour 'or better,' moving back and forth across the road," crossed an intersection without stopping, and overturned in a field killing the driver and injuring the passengers.

Allegations that defendant was driving drunk at night and on the wrong side of the street in a business section of Charlotte at a rate of 45 or 50 miles per hour were sufficient to state a cause of action for willful negligence. *Foster v. Hyman*, *supra*.

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However, evidence that defendant and plaintiff were riding motorcycles; that defendant was riding his motorcycle opposite to the customary direction followed on the dirt track; that defendant accelerated to a speed of 45 to 50 miles per hour toward plaintiff; that plaintiff drove his motorcycle off the trail to avoid collision; and that defendant apparently turned directly into plaintiff was insufficient to find willful and wanton negligence. *Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977).

In *Johnson v. Yates*, 31 N.C. App. 358, 229 S.E. 2d 309 (1976), this Court found the following to be sufficient evidence to go to the jury on willful and wanton negligence:

"[D]efendant driver, after drinking a quantity of intoxicants sufficient to cause his blood content of alcohol to be .17, operated the pickup truck in which intestate was riding as a passenger over a narrow rural paved road, in the nighttime, at a speed so great that when said driver lost control of the vehicle it slid on the paved portion of the road 260 feet, then slid on the ground adjoining the road 137 feet, and then struck a tree with a 12-inch trunk with such force that the tree was uprooted and mashed into and around the vehicle. . . ." 31 N.C. App. at 363, 229 S.E. 2d at 312.

Finally, the case *sub judice* should be distinguished from *Hughes v. Lundstrum*, *supra*. It is apparent that the *Hughes* Court reasoned that an instruction on willful and wanton negligence was unnecessary since the plaintiff's conduct, even considering the evidence in the light most favorable to plaintiff, was at least equally as aggravated as that of the defendant.

[3] The evidence in the case at bar tends to show the sequence and occurrence of the following events: The collision occurred during the nighttime in a 35 mile-per-hour zone along Green Street which at the point of impact had a level, smooth, dry surface. Defendant was travelling between 60 and 80 miles per hour in the westbound lane and struck plaintiff's vehicle in the eastbound lane. There was testimony that defendant shortly before the collision, was so drunk that he kept falling against his car. The same witness also testified that because of alcoholic consumption the defendant's speech was noticeably affected and that while talking he had difficulty keeping his eyes open. He was told he was too drunk to drive.

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We need not summarize plaintiff's other evidence. The foregoing evidence alone is sufficient to require submission to the jury on the issue of willful and wanton negligence. This is ample evidence from which a jury might conclude that defendant intentionally drove his automobile while voluntarily intoxicated, in excess of the posted speed limit, and on the wrong side of the street thereby willfully breaching duties imposed upon him by law. Furthermore, the jury could infer from the circumstances that defendant conducted himself with reckless indifference to the danger of others created by such conduct.

The trial court erred in directing a verdict for the defendant at the conclusion of plaintiff's evidence. Therefore, the judgment must be

Reversed.

Judges ARNOLD and MARTIN (Harry C.) concur.

BOBBY DAVIS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 7810SC65

(Filed 19 December 1978)

Administrative Law § 4—dismissal of State employee—stay order prior to final agency decision—delay caused by rehearing

The superior court had no authority under G.S. 150A-48 to enter a stay order of the dismissal of an employee of the N.C. Department of Transportation before a final decision was entered by the State Personnel Commission, and the Commission's order for a rehearing of petitioner's case after it declined to follow the recommendation of the hearing officer that a default be entered against the Department of Transportation for its failure to appear will not be deemed a "final agency decision" under G.S. 150A-43 on the facts of this case.

APPEAL by petitioner from *Canaday, Judge*. Judgment entered 28 July 1977 in the Superior Court, WAKE County. Heard in the Court of Appeals 23 October 1978.

Petitioner is appealing the denial in the Superior Court, Wake County, of his petition for the issuance of a "temporary in-

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junction restoring the Petitioner to his job" as Driver's License Examiner with the Department of Transportation "with full back pay, seniority, and all benefits, and that his employment records be purged of any reference to the matter of his discharge." Petitioner also seeks to enjoin further action by the Commissioner. On 17 December 1975, petitioner was notified of his dismissal based on four charges. The charges were as follows: (1) "Being absent from duty station without approved leave or authorization;" (2) "Conduct unbecoming to position of Driver License Examiner;" (3) "Embarrassment to the Commissioner and Driver License Section due to publicity from present confinement;" and (4) "Failure to take care of personal problems to avoid present conditions."

Petitioner sought review of his dismissal through administrative channels. On 9 February 1976, petitioner was afforded a hearing before the Personnel Officer of the Department of Motor Vehicles. When reinstatement was denied, petitioner appealed to the Employee Relations Committee of the Department of Transportation. After a hearing before that committee on 8 July 1976, petitioner was again denied reinstatement. Notice of appeal for a hearing de novo before the State Personnel Commission was duly filed.

The hearing was scheduled and held 11 February 1977, before a hearing officer. When the Department of Transportation failed to appear at the hearing, the hearing officer recommended that default be entered against it. The full State Personnel Commission declined to accept the recommendations of the hearing officer and remanded the matter for a second hearing upon motion of the Department of Transportation.

Petitioner then petitioned the Superior Court for a temporary injunction pursuant to G.S. 150A-43 and 44.

From the judgment of the Superior Court denying petitioner's prayer for reinstatement and ordering remand of the matter to the State Personnel Commission's hearing officer in accordance with the remand order of the full Commission, petitioner appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, for the State.

M. H. McGee for the petitioner appellant.

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MORRIS, Chief Judge.

Petitioner assigns as error the trial court's denial of his petition for temporary injunction and its remand of the action to the State Personnel Commission. He asserts that the court erred in concluding that there was no final agency decision within the meaning of G.S. 150A-43, therefore rendering the appeal premature and leaving the trial court without jurisdiction in the matter. It is well established that, as a prerequisite to judicial action, a party must generally exhaust available administrative remedies. *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Stevenson v. Dept. of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209 (1976), *cert. den.*, 291 N.C. 450, 230 S.E. 2d 767 (1977). *But see, McCrary v. Burrell*, 516 F. 2d 357 (4th Cir. 1976); *Williams v. Greene*, 36 N.C. App. 80, 243 S.E. 2d 156 (1978). Closely akin to this concept is the statutory requirement that appeal may be taken only from a "final agency decision". The judicial review provisions of the North Carolina Administrative Procedures Act provide in pertinent part as follows:

"§ 150A-43. *Right to judicial review.*—Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article."

"§ 150A-44. *Right to judicial intervention when agency unreasonably delays decision.*—Unreasonable delay on the part of any agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency."

"§ 150A-48. *Stay of board order.*—At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the agency decision pending the outcome of the review. The

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court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65."

Although petitioner denominated his action as a petition for temporary injunction under G.S. 150A-44, the remedy he is actually seeking is an "order staying the operation of the agency decision pending the outcome of review" of the case by the superior court, available under G.S. 150A-48 quoted above. Petitioner's position is apparently that, because of undue delay, he is entitled to a stay of his dismissal under G.S. 150A-44. This position is contrary to the case law and the plain words of the statute.

A recent decision by this Court met precisely the same point presented by petitioner's appeal. In *Stevenson v. Dept. of Insurance*, supra, a permanent employee of the Department of Insurance was dismissed for gross misconduct and conduct unbecoming a State employee. The employee sought an injunction under G.S. 150A-48 ordering a stay of the Department's decision terminating his employment pending a decision of the State Personnel Commission. The employee alleged that he was without a source of income pending the hearing and was unable to support his family despite efforts to obtain other employment. This Court, in reversing an order reinstating the employee, made the following observations and conclusions:

"Although we recognize the vagueness of the quoted statute, we feel that taken in its proper context, it authorizes a stay order only of those final agency decisions in which the person aggrieved has exhausted his administrative remedies. G.S. 150A-48 must be construed *in pari materia* with the rest of Article 4, Chapter 150A, entitled 'Judicial Review,' and particularly G.S. 150A-43 which states that '[a]ny person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article. . . .'

We think that G.S. 150A-48 was meant to entitle the aggrieved person to a stay order only after the final agency decision and either before or after the initiation of judicial review. Final agency decisions should be rendered after a hearing held without undue delay under G.S. 150A-23. G.S. 150A-44

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provides that '[u]nreasonable delay on the part of any agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency.' In the present case, this right may be asserted to prevent unreasonable delay in reaching a final agency decision but we do not think the superior court had authority to enter a stay order respecting plaintiff's dismissal pending final administrative review. *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970)." 31 N.C. App. at 302-303. *See also Church v. Board of Education*, 31 N.C. App. 641, 230 S.E. 2d 769 (1976), *cert. den.*, 292 N.C. 264, 233 S.E. 2d 391 (1977).

A careful reading of the applicable statutes bears out the correctness of that decision. G.S. 150A-44 provides for "a court order compelling action by the agency" as a supplement to the provisions against undue delay in holding a hearing. G.S. 150A-23(a). G.S. 150A-48 is a vehicle for reinstatement only "before or during the review proceeding". Since according to G.S. 150A-43 review is available only after a "final agency decision", the stay of a decision is similarly only available after a "final agency decision".

We are cognizant of the fact that in *Stevenson v. Dept. of Insurance*, *supra*, the employee was awaiting his initial hearing before the State Personnel Commission whereas petitioner in this case is awaiting a rehearing. Nevertheless, in neither case has the Commission rendered a final decision. Here the Commission declined to make a decision by rejecting the hearing officer's recommendation for reinstatement and ordering a rehearing upon motion of the respondent.

Petitioner argues that because of the delay caused by the rehearing, this Court should treat the Commission's order for rehearing as essentially a "final agency decision" under G.S. 150A-43. *Cf. Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961) (delay amounted to "final agency action" under § 10(c) of the Federal Administrative Procedures Act); *See also Nor-Am. Agricultural Products, Inc. v. Hardin*, 435 F. 2d 1133 (7th Cir. 1970). Under the facts of this case we decline to so hold. Although it is true G.S. 150A-23(a) requires a hearing without "undue delay", we are unable to conclude from the record that there was undue delay in providing a hearing for the petitioner. The peti-

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nent statute provides that if a party fails to appear after proper service of notice, the agency *may* proceed and render its decision in the absence of that party. G.S. 150A-25. The language is permissive, not mandatory. The Commission was acting within its statutory authority in ordering another hearing on the matter.

The intervention of courts into proceedings before administrative agencies has been condemned in this State. *Elmore v. Lanier, Com'r. of Insurance*, 270 N.C. 674, 155 S.E. 2d 114 (1967). Intrusion into these procedures should only be permitted under extraordinary circumstances where "undue delay" has left an aggrieved party without an adequate remedy at law. *Cf. Transit Co. v. Coach Co.*, 228 N.C. 768, 47 S.E. 2d 297 (1948) (statutory remedy inadequate). Petitioner has not presented such a case.

We are not unmindful of the mounting and valid nationwide criticism of the complexities and intricacies involved in the review of administrative actions at both the state and federal levels. Neither do we delight in applying the technicalities of the system to delay a decision on the merits of the case. *See* K. Davis, *Administrative Law Treatise* § 24.06 (Supp. 1970); Comment, *Administrative Law: Judicial Review in North Carolina*, 8 Wake Forest L. Rev. 67 (1971). Nevertheless, the statute and the case law are clear. A contrary holding could result in allowing employees who have been dismissed for good cause to take advantage of these same procedural intricacies and abuse the right to review by delaying the effect of dismissals at the expense of the taxpayers of the State.

In his second assignment of error petitioner asserts that once the trial court ruled, it was without jurisdiction and that it could not then remand the case for a hearing for the taking of respondent's evidence. Petitioner asserts this order was *ultra vires*. It is clear that the trial court's order was in effect a dismissal of the petition. It left the petitioner precisely where he was prior to the petition for injunctive relief. This assignment of error is overruled.

Affirmed.

Judges ARNOLD and ERWIN concur.

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IVAN HOYT POPE, SR. v. DIANE CASTER DEAL

No. 7819SC173

(Filed 19 December 1978)

Automobiles § 62.4— pedestrian—failure of motorist to sound horn—no negligence per se

A violation of G.S. 20-174(e), which requires a motorist to exercise due care to avoid hitting a pedestrian and to sound his horn when necessary, may not be considered negligence *per se*, and the jury, if they find as a fact that Section (e) of the statute is violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the person found guilty of such violation has breached his common law and statutory duty of exercising ordinary care.

APPEAL by defendant from *Walker (Hal H.)*, Judge. Judgment entered 14 October 1977 in Superior Court, ROWAN County. Heard in the Court of Appeals in Winston-Salem 28 November 1978.

Plaintiff brought this negligence action for personal injuries received as he was walking across a highway and was struck by defendant's vehicle. In her answer, defendant denied any negligence and pleaded plaintiff's contributory negligence. Plaintiff pleaded the doctrine of last clear chance in reply.

At trial plaintiff's evidence tended to show that on 27 February 1974 plaintiff, the owner of a plumbing company which was installing a pipeline under the Old Concord Road in Rowan County on that date, was struck by defendant's car at approximately 5:00 p.m. as he attempted to cross Old Concord Road from east to west at a 45 degree angle. Defendant's car was traveling south on the Old Concord Road and had come over the crest of a hill 375 feet north of the point of impact. Vision was unobstructed for both plaintiff and defendant for the entire 375 feet. It was daylight and the weather was clear and the construction area was marked by warning signs, one of which was located at the top of the hill north of the construction site. Old Concord Road is a two-lane road, 18 feet wide. Two employees of plaintiff's company were working in ditches on either side of the road. Shortly before the accident plaintiff had crossed the road from west to east to look for a rock for the employee working on the west side of the road. Gary Lankford, the employee on the east side of the road,

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saw plaintiff look for the rock and then start to cross back over to the west side of the road. Lankford saw no car approaching at this time. After he saw plaintiff step onto the road, Lankford looked down to gather his tools but then looked up just in time to yell to plaintiff and to see plaintiff look to his right and see defendant's car and attempt to jump out of the way. Plaintiff had just stepped over the center line when Lankford observed the car, and plaintiff appeared to see the car at the same time that Lankford did. As plaintiff jumped back he was struck by the car's left front fender and thrown into the air and landed in the north-bound lane of the road. Neither of plaintiff's employees heard a horn blow or tires screech prior to the accident and neither employee observed plaintiff from the time he first stepped onto the road to the time he was struck or knows whether plaintiff might have reached the center line, turned back and then turned again into the path of the car. Plaintiff himself remembers nothing about the accident as he suffered a loss of memory as a result of it. Defendant's car remained in its proper lane immediately before and after the accident and stopped approximately 150 feet past the point of impact.

Defendant's evidence tended to show that she was aware of the construction work being done along the Old Concord Road because she drove past it twice a day on her way to and from work. As she crested the hill north of the construction site she saw plaintiff on the east or left side of the road. She was going 40 m.p.h. although the speed limit was 55 m.p.h. As she came down the hill, plaintiff started to cross the road but then after taking a few steps, he turned and went back to the shoulder of the road as if he had seen her. After reaching the side of the road plaintiff suddenly turned and started trotting back across the road, and defendant had no time to sound her horn at this time but applied brakes as hard as she could. She was unable to avoid hitting plaintiff although she left 35 feet of skid marks leading to the point of impact.

Over defendant's objection the court submitted the issue of last clear chance to the jury. The jury found both plaintiff and defendant negligent but held that defendant had the last clear chance to avoid the accident and awarded plaintiff \$25,000 in damages. Defendant appeals.

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Woodson, Hudson, Busby & Sayers, by Donald D. Sayers, for the plaintiff.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, William C. Raper, and Joseph T. Carruthers, for the defendant.

MARTIN (Robert M.), Judge.

Defendant contends the court erred in instructing the jury that the defendant's failure to sound her horn, in violation of G.S. 20-174, was negligence *per se*.

In its instructions to the jury regarding negligence of the defendant, the trial court charged the jury as follows:

Now, members of the jury, as I discuss with you the contentions of negligence and contributory negligence, I will tell you when an act or omission would be negligence within itself, or, on the other hand, when the reasonable person test should be applied.

* * *

As to the duty to sound the horn, that is a statute—a safety statute that has been enacted in our law. If you find that she should have sounded her horn at observing this plaintiff on this occasion under these circumstances and failed to do so after she discovered that he was in a position of peril, then if you find that she did that, *you would find that that was negligence or a violation of that law and which would be negligence in itself*, members of the jury. (Emphasis added.)

The relevant portion of G.S. 20-174 is paragraph (e), which provides as follows:

Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

Our courts have repeatedly and explicitly held that violation of G.S. 20-174 does not constitute negligence *per se*. In *Clark v.*

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Bodycombe, 289 N.C. 246, 221 S.E. 2d 506 (1976), the Supreme Court discussed the provisions of G.S. 20-174 and reaffirmed the proper rule that a violation of that statute is not negligence *per se*, at 251-52:

Ordinarily one who violates the provisions of safety statutes is guilty of negligence *per se* absent a specific legislative exception. No specific legislative exception appears in this safety statute (Section 20-174). However, our Court has consistently held that violations of G.S. 20-174 do not constitute negligence *per se*. (Citations omitted.)

In *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817 (1954) the Supreme Court reviewed and approved a portion of a jury charge relating to Section 20-174, and stated at 196:

In the charge, the judge read to the jury G.S. 20-174, subsections (a), (b), and (e), and followed the reading with this instruction: "I instruct you, gentlemen of the jury, that the violation of that section of the statute would not constitute negligence *per se*, but would be evidence to be considered along with other evidence of negligence." The foregoing is the basis of plaintiff's exception No. 13. The charge was in accordance with the decisions of this Court, and the exception cannot be sustained. (Citations omitted.)

In *Simpson v. Curry*, 237 N.C. 260, 74 S.E. 2d 649 (1953), the trial court read to the jury subsections (a), (d), and (e) of G.S. 20-174, and the court charged the jury that a violation of this statute was negligence *per se*. On appeal, the Court reversed and granted a new trial. In reviewing this charge and the statute on appeal, the Supreme Court stated at 262:

... But we have held that a violation of this statute is not negligence *per se* but only evidence thereof which may be considered with other facts in the case in determining whether the party was guilty of negligence or contributory negligence as charged. (Citations omitted.)

Accord: *Simpson v. Wood*, 260 N.C. 157, 132 S.E. 2d 369 (1963); *Gamble v. Sears*, 252 N.C. 706, 114 S.E. 2d 677 (1960); *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484 (1948).

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In his brief, plaintiff correctly points out that the above cited cases, dealing with the issue of a pedestrian's negligence, consistently held that a violation of the provisions of G.S. 20-174 does not constitute negligence in itself. He argues that the court has not applied the same reasoning to cases when the violation of G.S. 20-174 has been committed by the driver who encounters a pedestrian and has no application to the sanction of G.S. 20-174(e) as it applies to motorists. In support of his argument he cites *Williams v. Woodard*, 218 N.C. 305, 306, 10 S.E. 2d 913 (1940). We quote from that opinion as follows:

The court instructed the jury that it was negligence *per se* for one to violate "the statute regulating the conduct and operation of motor vehicles on the public highways, and the conduct and behavior of pedestrians using the highways, but the element of proximate cause must also be shown." This instruction was taken from the case of *Holland v. Strader*, 216 N.C., 436, 5 S.E. (2d), 311, and is correct as applied to violations of the motor vehicle law, ch. 407, Public Laws 1937, save and except those provisions which relate to the speed limits mentioned therein, any speed in excess of which constitutes "*prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful." Sec. 103; *Smart v. Rodgers*, 217 N.C., 560.

It is true there is allegation here of excessive speed, but the instruction which defendants assign as error was in reference to alleged violations of the motor vehicle law in driving on the wrong side of the road, sec. 108, and in failing to warn the plaintiff, who was a pedestrian. Sec. 135. These sections were called to the jury's attention immediately following the above instruction, and it is not thought the jury could have understood it as referring to a violation of the speed restrictions set out in sec. 103. This last section was not mentioned in the charge.

In *Williams, supra*, plaintiff argues that "the Court specifically held that it was correct to instruct a jury that it was negligence *per se* for one to violate the motor vehicle statutes which refer to driving on the wrong side of the road . . . 'and in failing to warn the plaintiff, who was a pedestrian.'"

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While the general rule in North Carolina is that the violation of a safety statute constitutes negligence *per se*, the application of the general rule to statutes regulating the conduct of pedestrians has been rejected, as evidenced by the cases cited herein. Section (e) of the statute is not excepted from the holding in those cases that a violation of G.S. 20-174 is not negligence *per se* and a violation of the statute is held to be evidence of negligence only.

Relying upon these well-reasoned opinions we hold that a violation of G.S. 20-174(e) may not be considered negligence *per se*, and the jury, if they find as a fact that Section (e) of the statute is violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the person found guilty of such violation has breached his common law and statutory duty of exercising ordinary care. Of course, this view does not preclude a finding of negligence as a matter of law where the only inference to be drawn from all the facts is that the motorist was negligent. Such finding does not appear warranted in this case.

When the trial court instructed the jury that if the defendant failed to sound her horn that would be negligence in itself, the court usurped one of the functions of the jury. This constitutes prejudicial error which entitles defendant to a new trial.

New trial.

Judges PARKER and ERWIN concur.

MINNIE ARMSTRONG MYERS v. DONALD ODELL MYERS

No. 7821DC63

(Filed 19 December 1978)

1. Bastards § 13— legitimation

The requirements of G.S. 49-12 and 49-13 for the legitimation of a child born out of wedlock were fully complied with where the father and mother of the child were thereafter married; the father and mother filed the necessary affidavits wherein the father acknowledged that he was the natural father of the child; the father and mother filed a request for a new certificate of birth as

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required by G.S. 49-13; the original birth certificate and the marriage certificate were filed with the State Registrar of Vital Statistics; and a new birth certificate was then issued.

2. Bastards § 13; Divorce and Alimony § 24—legitimation of child—estoppel to deny paternity

Defendant in a child support action was estopped to deny paternity of the child by his legitimation of the child pursuant to G.S. 49-12 and 49-13 after his marriage to the child's mother where there was no evidence that defendant did not know the consequences of his acts when he filed an affidavit stating he was the "natural father" of the child and no evidence of fraud or other misconduct on the part of plaintiff mother or any other person.

APPEAL by defendant from *Harrill, Judge*. Judgment entered 24 October 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 14 November 1978 in Winston-Salem.

Plaintiff-wife instituted this civil action seeking alimony *pendente lite*, child custody and support, and attorney fees. Defendant answered and counterclaimed for divorce from bed and board. Defendant denied any legal responsibility for the support of Anthony Brian Myers, a minor child born 16 July 1965, after divorce of plaintiff and defendant in 1958 and before they remarried on 7 March 1971. Judgment was entered in favor of the plaintiff on all issues including an order for the defendant to pay weekly support for Anthony Brian Myers, his minor child. Defendant appealed.

Randolph & Randolph, by Doris G. Randolph, for plaintiff appellee.

Morrow, Fraser & Reavis, by Larry G. Reavis, for defendant appellant.

ERWIN, Judge.

At the hearing of this cause before Judge Harrill, the following evidence was offered by defendant and later excluded by Judge Harrill:

"Defendant testified that Anthony Brian Myers was born on the 16th day of July, 1965; that plaintiff and defendant were not married to each other at the time; that they thereafter married on the 7th day of March, 1971. Defendant further testified that he signed the affidavit contained in 'Re-

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quest for New Certificate of Birth' in the legitimation proceeding of Anthony Brian Myers, that this procedure was followed and request for new certificate for birth filed at his own instance.

. . .

Anthony Brian Myers is not the defendant's son and that in fact the defendant was married to someone other than plaintiff during the year Anthony Brian Myers was born. The defendant has not told anyone that he is the father of Anthony Brian Myers. The defendant signed the request for a new certificate of birth before a Notary Public; however, he did not swear to the affidavit. The defendant mailed the request for the new certificate of birth directly to the Bureau of Vital Statistics; North Carolina Department of Human Resources; Raleigh, North Carolina [sic]. (Paragraph allowed over plaintiff's objection—later excluded.)

JUDGE'S RULING AND STATEMENT. That after hearing all of the evidence, I have decided to exclude all testimony and to hereby exclude all testimony offered by the plaintiff or the defendant that would tend or tends to controvert or go behind the closed file relating to the new birth certificate and application of same, file volume number 65, page 54606, closed file in the Vital Records Division, North Carolina Department of Human Resources."

The court entered the following findings of fact as related to this appeal:

"[A second child, ANTHONY BRIAN MYERS, was born on the 16th day of July, 1965, a period of time between the two marriages of the parties. Thereafter, plaintiff and defendant filed affidavit with the Register of Deeds of Surry County on the 2nd day of June, 1976, and request for new birth certificate for Anthony Brian Myers on DHS Form 1037, Vital Records, North Carolina Department of Human Resources, acknowledging that defendant was the natural father of the child and that he had subsequently married the mother. This affidavit and request was filed under the provisions of North Carolina General Statutes 49-12.]

EXCEPTION NO. 1"

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Upon this finding of fact, the court concluded as a matter of law that:

"[Pursuant to File No. Volume 65, Page 54606 closed file in the Vital Records Division, North Carolina Department of Human Resources, sealed legitimation file, Anthony Brian Myers is the legitimated child of the parties hereto. The minor child, Anthony Brian Myers, was legitimated by defendant on the 2nd day of June, 1976, as provided by North Carolina General Statutes 49-12 and 49-13, and defendant is thereby estopped from collateral attack upon said proceeding and from denial of paternity of said child in this proceeding.]

EXCEPTION NO. 2"

Defendant contends that the trial court erred in three respects: (1) that his evidence was improperly excluded and should have been considered, (2) that the finding of fact is in error because his evidence was excluded, and (3) the conclusion of law was in error, and had the court considered his evidence, the above finding of fact and conclusion of law would have been found favorable to him. We do not agree.

G.S. 49-12 reads:

"Legitimation by subsequent marriage.—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock."

G.S. 49-13 reads:

"New birth certificate on legitimation.—A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bear-

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ing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father."

"In part these two sections of our statutes regulate the family circle and define the rights and responsibilities of members of that circle. They must therefore be construed *in pari materia*." *Carter v. Carter*, 232 N.C. 614, 616, 61 S.E. 2d 711, 713 (1950).

[1] In the case *sub judice*, the record is clear that the minor child was born out of wedlock; that the father of the child and his mother were thereafter married; and that the father and mother filed the necessary affidavits wherein the father acknowledged that he was the natural father of the child. The plaintiff and defendant filed a request for a new certificate of birth proper in form with the necessary information as required by G.S. 49-13. The original birth certificate and the marriage certificate showing the date of remarriage as 7 March 1971 were filed with the State Registrar of Vital Statistics. A new certificate was issued. G.S. 49-12 and 49-13 were fully complied with, and we so hold.

[2] The next question presented is whether the defendant father of the child in question is estopped from collaterally attacking the proceeding set out above and from denial of paternity of the said child in this civil action. We agree with the trial court and answer the question, "yes." There is not any evidence in the record to show that the defendant did not know what he was doing or that he did not know the consequences of his acts when he filed his affidavit stating he was the "natural father" of the child. Defendant does not allege or offer any evidence of fraud or any other misconduct on the part of plaintiff or any other person. It appears to us that the defendant would have known the true facts of the event in question on 2 June 1976 as well as he did on 11 August 1977. Defendant does not offer any reason for giving the affidavit on 2 June 1976 nor does he offer any reason for changing his position to repudiate the affidavit.

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The judgment is

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

J. W. KIRBY v. DR. NAT WINSTON

No. 7825DC66

(Filed 19 December 1978)

Accounts § 2— account stated—judgment for less than amount of account—error

Where the trial court found that plaintiff performed grading work for defendant and billed him for \$1302, defendant did not object but paid \$300 and promised to pay more the following month, and plaintiff then billed defendant for the balance of \$1002 which defendant did not pay, the trial court erred in entering judgment for plaintiff for \$600 instead of \$1002.

APPEAL by plaintiff from *Tate, Judge*. Judgment entered 22 August 1977 in District Court, CALDWELL County. Heard in the Court of Appeals 23 October 1978.

Plaintiff filed his complaint alleging that he had performed certain work for defendant on his land in the amount of \$1,302.00; that defendant had paid him \$300.00 on the debt due and that plaintiff was entitled to recover \$1,002.00 from defendant plus interest. Plaintiff attached defendant's letter to his complaint which reads:

"1 June '74

Dear Sir:

Enclosed is a check for \$300.00 partial payment on my bill. I was much surprized at the cost of the work—not expecting it to cost more than \$500.00 or so. I want to get up there and take a look & will forward additional payment next month.

Sincerely,
s / NAT WINSTON"

Defendant answered, denying the material allegations of the complaint and asserting as a defense:

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"That if the plaintiff did furnish labor and/or services for the defendant, which is specifically denied, the same were not performed in a workmanlike manner, the value of such labor and/or services of the plaintiff have been fully paid and the plaintiff fully satisfied therefor."

Judgment was entered in favor of the plaintiff for \$600.00 plus interest from 22 April 1974. Plaintiff appealed.

L. H. Wall and Walton Peter Burkhimer, for plaintiff appellant.

Seegers & Kilgore, by Joseph W. Seegers, for defendant appellee.

ERWIN, Judge.

The trial judge entered the following order:

"JUDGMENT (Filed Sept. 12, 1977)

THIS CAUSE, coming on to be heard and being heard before the Honorable SAMUEL MCD. TATE, Judge Presiding over the 22 August 1977, Civil Session of the District Court for Caldwell County, North Carolina; and the court, sitting as judge and jury, finds the following facts.

* * *

2. Prior to 22 April 1974, defendant contracted with plaintiff for plaintiff to do grading and hauling work on the above described Avery County lands owned by defendant.

* * *

4. On 22, 23, 24, 25 and 26 April 1974 plaintiff and his helper, using a front end loader for 36.5 hours at \$20.00 per hour and a dragline for 26.0 hours at \$22.00 per hour, performed the work for which defendant contracted that plaintiff should do on the lands of the defendant.

5. Upon completion of said labor upon the lands of defendant, plaintiff rendered to defendant a statement for the \$1302.00 due to plaintiff from defendant therefor, to which statement defendant did not object.

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6. On or about 1 June 1974 defendant paid to plaintiff \$300.00 on the above statement of account and promised to pay more in July.

7. In spite of many billings for payment of the \$1,002.00 balance due on said account stated, defendant made no further payments.

8. Suit on said account stated was filed on about 23 August 1976.

9. Defendant's evidence showed that his only defense to plaintiff's claim is that he thought that the amount billed was too much.

WHEREFORE, based upon the foregoing findings of fact, the court concludes as matters of law that:

1. Plaintiff is entitled to judgment on his claim against defendant.

* * *

NOW, THEREFORE, it is ORDERED, ADJUDGED and Decreed that:

1. Plaintiff have and recover of defendant the sum of \$600.00 with interest thereon at the legal rate of six (6%) percentum per annum from 22 April 1974 until paid in full.

* * *

This 26th day of August, 1977.

s / SAMUEL MCD. TATE
Judge Presiding"

The record on this appeal presents one question for our determination: "Was it error for judge to render judgment for amount less than the full amount of the accounted [sic] stated shown in the findings of fact and conclusions of law?"

The plaintiff contends that the judgment of \$600.00 is contrary to the judge's findings of fact and that he had established an account stated on two theories: (1) defendant's failure to object to the statement submitted, and (2) defendant's partial payment and promise to pay more.

Kirby v. Winston

We agree with plaintiff and remand this case to the trial court to enter judgment in the amount of \$1,002.00.

"When the parties to an open account reach an agreement with respect to the totality of the transactions between them, the new transaction is called a 'statement' of the account, and the situation between the parties is called an 'account stated,' which may be broadly defined as an agreement based upon prior transactions between the parties, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. . . . To effect an account stated the outcome of the negotiations must be the recognition of a balance due from one of the parties to the other with a promise, express or implied, to pay that balance. . . .

The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular items." 1 Am. Jur. 2d, Accounts and Accounting, § 21, pp. 395-97.

Our Supreme Court held in *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 530-31, 126 S.E. 2d 500, 506-07 (1962):

"The following succinct statement of the law with reference to account stated appears in *Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503: 'To constitute a stated account there must be a balance struck and agreed upon as correct after examination and adjustment of the account. However, express examination or assent need not be shown—it may be implied from the circumstances. * * * An account becomes stated and binding on both parties if after examination the party sought to be charged unqualifiedly approves of it and expresses his intention to pay it. * * * The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due, * * * or makes a part payment and promises to pay the balance. * * * It is accepted law in this jurisdiction that when an account is rendered and accepted, or when so rendered there is no protest or objection to its correctness within a reasonable time,

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such acceptance or failure to so object creates a new contract to pay the amount due.'".

The record before us clearly shows: (1) the account in question was an open one; (2) plaintiff billed defendant for the totality of the transactions between them; (3) the exact balance due plaintiff was stated as final; and (4) defendant made a payment on the account leaving a balance of \$1,002.00 which he stated he would pay. The trial court found that plaintiff billed defendant for \$1,002.00 after his payment of \$300.00 on 1 June 1974.

The record does not show any fraud, mistake, or want of consideration on the part of the parties. The trial judge did not have any authority, on the record before us, to reduce the amount stated to the sum of \$600.00.

This case is remanded to the District Court for entry of judgment for the plaintiff in the amount of \$1,002.00 with interest thereon at the legal rate of six percent (6%) per annum from 22 April 1974 until paid in full. Defendant is taxed with cost.

Remanded to enter proper judgment.

Judges MORRIS and ARNOLD concur.

PHILIP M. GARRETT, PLAINTIFF v. GARRETT & GARRETT FARMS, EMPLOYER
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY,
CARRIER DEFENDANTS

No. 7810IC169

(Filed 19 December 1978)

Master and Servant § 81—workmen's compensation—farmer in partnership—farmer as "employee"—estoppel

The Industrial Commission erred in determining that plaintiff, who operated a farming partnership with his son, was not an employee and that the Commission therefore did not have jurisdiction over his workmen's compensation claim, since the insurer treated plaintiff as an employee and collected a premium based on his salary.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 5 December 1977 in Docket G-4283. Heard in the Court of Appeals 29 November 1978.

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This is an appeal by Philip M. Garrett from an order of the Industrial Commission dismissing plaintiff's claim for lack of jurisdiction.

Plaintiff's evidence tends to show that plaintiff and his son were working partners in a farming operation. They had three other persons regularly employed on the farm. Donald W. Clark is an agent for North Carolina Farm Bureau Mutual Insurance Company (hereinafter Farm Bureau). As such agent, he negotiated a policy of workmen's compensation insurance for plaintiff. He questioned whether plaintiff or his son would be covered. He inquired of the Farm Bureau underwriting office as to this, and Mr. Buchanan of that office told him Garrett and his son would be covered as long as the premium was paid based upon the amount of income they earned. The application was thereupon filed and the policy issued. The salaries of plaintiff and his son were included in the total payroll upon which the premium was based. Clark knew that plaintiff and his son operated as a partnership and this was the reason for the inquiry to the underwriting department of Farm Bureau. The premium was paid with a partnership check. The premium was subject to change, depending upon a later audit to determine the actual amounts received by plaintiff and his son. On 7 October 1975 plaintiff was injured in an accident arising out of the farming operation. Plaintiff duly filed claim under the policy issued by Farm Bureau, which was denied, and instituted this proceeding.

At the conclusion of plaintiff's evidence, Deputy Commissioner Roney entered an order finding facts and concluding as a matter of law that the plaintiff was not an employee and that the law of estoppel did not apply to give the Commission jurisdiction. The full Commission adopted this order.

Plaintiff appealed.

LeRoy, Wells, Shaw, Hornthal, Riley & Shearin, by Roy A. Archbell, Jr. and Norman W. Shearin, Jr., for plaintiff appellant.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff assigns as error the dismissal of the claim for lack of jurisdiction. At the outset, we note that Farm Bureau does not

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contest that plaintiff was injured by an accident arising out of and in the course of employment. The Commission so found in its finding of fact 7, and Farm Bureau did not except or object. Likewise we note that plaintiff's work was farming, ordinarily exempt from the requirements of the Workmen's Compensation Act. "[A]n employer of . . . farm laborers . . . who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed . . . to have accepted the provisions of this Article . . . and his employees shall be so bound . . ." N. C. Gen. Stat. 97-13.

The Commission determined plaintiff was not an employee when injured and dismissed the claim. In this we find error.

In *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942), plaintiffs' decedent was the president and general manager of a small corporation, who also worked as a salesman and collector of accounts. The insurance carrier's agent told decedent to include his salary in the payroll for the purpose of determining premium. Premiums were paid. Pearson was killed in an accident arising out of his work.

The Court held it did not need to decide the question of whether decedent was an employee within the meaning of the Workmen's Compensation Act, as defendant carrier, by its treatment of him as an employee and accepting the benefits of that status, had recognized his status as an employee to such an extent that it cannot now assert the contrary after loss has been sustained. After treating the claimant as an employee for the purpose of collecting the premium, the company could not, after loss, deny that he was an employee. (Section 2 of Chapter 97 of the General Statutes of North Carolina was amended in 1955, after *Pearson*, to include executive officers of corporations within the statutory definition of "employee.")

In *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964), the Court held that where carrier accepted premium based on claimant's salary, with knowledge, it was estopped to deny his status as an employee.

"The law of estoppel applies in compensation proceedings as in all other cases." *Biddix v. Rex Mills*, 237 N.C. 660, 665, 75 S.E. 2d 777, 781 (1953). The status of claimant as an employee may be

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established by way of estoppel. *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977); *Britt v. Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978); 8 Strong's N.C. Index 3d, Master and Servant § 81, p. 649.

As in *Pearson, supra*, the Commission was not required to decide the precise question of whether plaintiff could be classified as an employee. Farm Bureau, by their treatment of plaintiff as an employee and accepting the benefits of that status, cannot now be permitted to assert the contrary after loss has been sustained.

The evidence and findings of fact of the Commission support the conclusion that Farm Bureau is estopped from denying plaintiff's status as an employee when injured. We so hold.

The order of the Commission holding plaintiff was not an employee and dismissing plaintiff's claim is reversed.

The case is remanded to the Commission for hearings to determine the award of compensation plaintiff is entitled to receive.

Reversed and remanded.

Judges MORRIS (now Chief Judge) and WEBB concur.

STATE OF NORTH CAROLINA v. ROY MCCAIN, JR.

No. 7826SC779

(Filed 19 December 1978)

1. Criminal Law § 66.5— show-up—no right to counsel

Defendant did not have a constitutional right to counsel at the time of a show-up in a hospital where defendant had not been formally arrested or charged.

2. Criminal Law § 66.17— suggestive show-up at hospital— independent origin of in-court identification

The trial court properly ruled that a robbery victim's in-court identification of defendant and his accomplice was of independent origin and not tainted by a show-up at a hospital where the victim observed defendant and his accomplice over an extended period of time at a restaurant and at the accomplice's apartment where the robbery occurred and remembered many

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details about them; the show-up lasted only a few seconds; the victim gave officers an accurate description of defendant and his accomplice and the apartment and its location; the victim did not identify anyone else as the perpetrator of the robbery; the victim did not fail to identify defendant; and the lapse of time between the robbery and show-up was only a few hours.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 25 April 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 December 1978.

Defendant was indicted and convicted of common law robbery. Sandra Holloway was also charged with common law robbery, and her case was consolidated with defendant's for trial. The court held a voir dire hearing in the absence of the jury concerning admissibility of the in-court identification of defendant.

Bobby Lee Foust, age 39, testified on voir dire he was in the Jiffy House Restaurant in Charlotte about 9:30 p.m. He had a beer. The lighting in the restaurant was good, similar to the courtroom. He had good vision. A female, Sandra Holloway, sat next to him within reaching distance. She was short, light brown skin, with short hair. He talked to her about 30 minutes. She offered to give him a date for \$20 and they agreed on \$15. Twice he went to the restroom, and each time on returning defendant was talking to her. Defendant wore a pea-green leather jacket and brown pants. He had a mustache like the one he has now. He was within five feet of defendant. About 10 or 10:30 Foust left the Jiffy House with Sandra and went to her apartment. He sat on a couch while she changed clothes. Two men were outside in the hall arguing. Sandra let them in the apartment. One was the defendant, McCain. He (Foust) started to leave and forced his way through the locked door, but defendant and the other man knocked him down, beat him, and dragged him back into the apartment. They threw a coat over his head and went through his pockets. He had about \$300, and it was taken. The two men went into a bedroom, and Sandra told him he could go. He drove home, then went by ambulance to the hospital. Officer Hilderman came to the hospital. He told Hilderman what had happened and gave him a detailed description of defendant and Sandra and the location of the apartment. He identified defendant and Sandra in the courtroom.

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Officer Hilderman testified he recieved a call about Foust being in the hospital. He went there and talked with Foust who gave him descriptions of defendant and Sandra and of the apartment. He went to the apartment and found defendant and Sandra. They were brought to the hospital and placed in the hall outside Foust's room. Hilderman told Foust he had two people he wanted him to look at. The door was opened for about five to ten seconds. Foust said he recognized them, that they were the ones who did it. Hilderman then advised defendant and Sandra they were charged with common law robbery, advised them of their rights, and transported them to jail.

The jury returned a verdict of guilty of common law robbery and defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Gene H. Kendall for defendant appellant.

MARTIN (Harry C.), Judge.

Counsel for appellant failed to include in the record on appeal the order of the trial court overruling defendant's objection to the in-court identification of defendant. This is in violation of Rule 9(b)(3) (viii) and (x) of the North Carolina Rules of Appellate Procedure. These rules are mandatory. The defendant appellant has the duty to see that the record on appeal is properly made up. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965); *State v. Byrd*, 4 N.C. App. 672, 167 S.E. 2d 522 (1969). Defendant does include in the record on appeal a statement that the court ruled the in-court identification was admissible as being based upon Foust's observance of defendant at the Jiffy House and the apartment and not based upon any subsequent identification of defendant. Defendant objected to this ruling.

[2] We hold the trial court properly admitted the in-court identification of defendant. There is ample evidence in the voir dire and before the jury to sustain the court's ruling that the in-court identification was independently based upon Foust's observation of defendant and Sandra at the Jiffy House and at the time of the robbery. Being fully supported by the evidence, this conclusion

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must be upheld. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091 (1977).

[1] Defendant did not have a constitutional right to counsel at the time of the show-up in the hospital. Although defendant and Sandra were in custody, they had not been formally arrested or charged. The Sixth Amendment right to counsel only applies at or after the time that adversary judicial proceedings have been initiated against defendant. *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158 (1932); *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified as to sentence of execution*, 428 U.S. 902, 49 L.Ed. 2d 1205 (1976).

The principles of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), have no applicability to this issue. The *Miranda* decision is concerned with Fifth Amendment rights preventing compulsory self-incrimination.

The evidence of in-court identification must also survive the due process test. This is expressed in terms of the "totality of the circumstances" in *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972). There the Court set out several factors to be considered in determining whether the circumstances surrounding the identification complied with due process requirements. In evaluating the likelihood of misidentification, factors to be considered are: (1) the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention; (2) the manner in which the show-up was conducted; (3) the accuracy of witness's prior description of the criminal; (4) whether witness has identified someone else as the criminal; (5) prior identification of defendant as the criminal; (6) failure to identify defendant on a prior occasion; (7) lapse of time between alleged act and show-up. *State v. Branch*, *supra*.

In *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977), the Court held even though the out-of-court identification was suggestive it did not per se exclude the evidence. The test remains whether under the "totality of the circumstances" the identification was reliable, even though the show-up was suggestive. "The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." *Manson*, *supra*. The testimony of the show-up identification of McCain at the

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hospital complies with the standards of *Manson* and was admissible. The show-up was not constitutionally impermissible. It was not so suggestive and conducive to mistaken identification as to offend fundamental standards of decency, fairness, and justice. *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967); *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975).

[2] The trial court's ruling as to the in-court identification of McCain is supported by the principles in the trilogy of *Kirby*, *Neil*, and *Manson*. Foust was able to see and observe defendant and Sandra over an extended period of time; he gave them close attention and remembered many details about them; the officer did not say he had the two who robbed Foust; the show-up lasted only a few seconds; Foust gave the officers an accurate description of defendant and Sandra and the apartment and its location; Foust did not identify anyone else as the perpetrator of the robbery; he did not fail to identify defendant; the lapse of time between the robbery and the show-up was only a few hours. The evidence supports the finding that the in-court identification of McCain was of independent origin based solely upon Foust's recollection of McCain at the time of the crime. Under the totality of all the circumstances, the in-court identification is not tainted by the hospital show-up.

While counsel do not refer to Article 14 of Chapter 15A of the General Statutes of North Carolina in their briefs, the terms of the statute itself recognize that it does not set out *exclusive* procedures for non-testimonial identification. N. C. Gen. Stat. 15A-272. The facts of this case do not show a violation of this Article in the identification of defendant. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

No error.

Chief Judge MORRIS and Judge ERWIN concur.

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STATE OF NORTH CAROLINA v. WILLIAM BOONE

No. 781SC709

(Filed 19 December 1978)

1. Burglary and Unlawful Breakings § 1.2— entry into store during business hours—no breaking

A person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry under G.S. 14-54.

2. Larceny § 6.1— value of stolen merchandise—opinion evidence admissible

In a prosecution for felonious larceny of sweaters from a retail store, the trial court did not err in allowing the sales clerk present in the store on the night the items were taken to express her opinion as to the fair market value of the stolen merchandise, since the witness testified that she was very familiar with the sweaters, was interested in several of them herself, and was familiar with the price of the sweaters because she had sold them since she began working at the store.

3. Criminal Law § 88.1— objection to question sustained—answer read by reporter—no error

Defendant's contention that the trial court erred in sustaining the State's objection to a question asked on cross-examination and subsequently permitting the court reporter to give the answer to the jury because this procedure prohibited the jury from judging the credibility of the witness by her demeanor while answering the question is without merit since the answer was a one-word response and was in fact favorable to defendant.

4. Criminal Law § 34.2— booster box—use by professional shoplifters—evidence not prejudicial

In a prosecution for larceny, testimony that a box found in the trunk of defendant's vehicle was a "booster box . . . generally used by professional shoplifters" was a relatively insignificant part of the State's case, and defendant was not injured in light of the other evidence of his guilt.

5. Criminal Law § 102.8— defendant's failure to testify—comment not permitted

The trial court did not err in refusing to permit defendant's counsel to argue to the jury concerning defendant's failure to testify. G.S. 8-54.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 23 March 1978 in Superior Court, DARE County. Heard in the Court of Appeals on 15 November 1978.

Defendant was charged in a proper bill of indictment with one count of felonious entry with intent to commit larceny and

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one count of felonious larceny. Upon his plea of not guilty, the State presented evidence tending to show the following:

On the evening of 18 November 1977, Indian Imports, a retail store engaged in selling imported clothing, was open for business to the public. At approximately 7:15 p.m. defendant walked into the store and asked Jane Riddle, the sales clerk, for directions to Elizabeth City. The defendant then left the store but returned shortly thereafter with two women and a man. The defendant walked up to the door but did not go inside. The other three persons with the defendant went inside and walked around where some sweaters and dresses were located. About five minutes later, they left without making a purchase. After they left, the sales clerk noticed that two \$50 sweaters were missing and immediately called the police in Nags Head. An automobile operated by the defendant with three other persons was stopped by the police. Defendant consented to a search of the car and the police found seven sweaters in the back seat and a cardboard "booster box" in the trunk. The sweaters were identified as belonging to the store. The sales clerk testified that in her opinion the sweaters had a fair market value of \$250 to \$300.

The defendant presented no evidence.

Defendant was found guilty as charged. From a judgment entered on the verdict imposing a sentence of eight to ten years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Amos C. Dawson III, for the State.

Twiford, Trimpi & Thompson, by Russell E. Twiford and John G. Trimpi, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit with respect to the charge of felonious entry. Defendant contends that a person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry. We agree.

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Although the precise issue presented by this assignment of error has never been addressed by the North Carolina courts, we think the case of *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911), supports the proposition that the entry proscribed by the statute contemplates an unauthorized or unpermitted entry, and thus an entry with the consent of the owner is not an unlawful entry under G.S. § 14-54.

The provisions of G.S. § 14-54 are as follows:

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.

(b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a).

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

In *State v. Goffney*, *supra*, the defendant was charged under Revisal, § 3333 (1908), the statutory predecessor to G.S. § 14-54. The evidence in *Goffney* tended to show that the owner of the store had directed an employee to induce the defendant to enter the store to steal some goods. Once the defendant was inside the store, he was arrested. The court held:

In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one.

Upon the facts in evidence no crime was committed, because the entry was with the consent and at the instance of the owner of the property.

State v. Goffney, 157 N.C. at 628, 73 S.E. at 164.

We hold that there is no evidence in this record to warrant submission of the case to the jury on the charge of violating G.S. § 14-54.

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[2] Defendant next contends the trial court erred in allowing Jane Riddle, the sales clerk present in the store on the night the items were taken, to express her opinion as to the "fair market value" of the stolen merchandise.

The general rule in North Carolina is that a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific personal property. "[I]t is not necessary that the witness be an expert; it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it." 1 Stansbury's N.C. Evidence § 128, at 408 (Brandis rev. 1973); *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968).

In the present case, the witness testified that she was very familiar with the sweaters, was interested in several of them herself, and was familiar with the price of the sweaters because she had sold them since she began working at the store. She was permitted to testify as to the retail prices of the sweaters and that the "fair market value" of all seven was "about \$250 to \$300 or more." We think an adequate foundation was laid to place into evidence her opinion as to the value of the sweaters. This assignment of error has no merit.

[3] By assignment of error number three, defendant contends that the court erred in sustaining the State's objection to a question asked on cross-examination and subsequently permitting the court reporter to give the answer to the jury. Jane Riddle, after testifying as to her opinion of the fair market value of the sweaters on direct, was asked about the markup of the sweaters on cross-examination, as follows:

Q. Isn't it a fact that a sweater that you say was worth \$50 actually costs \$25, in other words being a hundred percent markup? OBJECTION. SUSTAINED. You need not answer that.

After the State had presented all of its evidence the trial judge allowed the court reporter to read to the jury from the record the answer the witness would have given had she been allowed to respond: "Yes."

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Defendant contends that this procedure prohibited the jury from judging the credibility of the witness by her demeanor while answering the question. We fail to see how the defendant could possibly have been prejudiced since the answer was a one-word response and was in fact favorable to the defendant. This assignment of error has no merit.

[4] By assignments of error numbers four and five, defendant contends the trial court erred in allowing L. B. Dickens, the police officer who searched defendant's vehicle, to testify that a cardboard box found in the trunk was a "booster box" that was "generally used by professional shoplifters" and in allowing the box to be subsequently introduced into evidence. Defendant argues that any evidence concerning the "booster box" is irrelevant and its admission prejudicial.

The general rule in North Carolina is that evidence tending to show that the defendant has committed separate offenses is not admissible if "its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's N.C. Evidence § 91, at 289-90 (Brandis rev. 1973). Evidence is relevant if it has any logical tendency to prove a fact at issue in a particular case, and in a criminal case every circumstance calculated to throw light upon the purported crime is admissible. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

In the present case, there was no evidence tending to show that the "booster box" was used in the commission of the crimes defendant was charged with. Nevertheless, we fail to see how the officer's testimony with regard to the "booster box" or its admission could have prejudiced the defendant in light of the overwhelming evidence of the defendant's participation in the crime. The "booster box" was a relatively insignificant part of the State's case and defendant was not injured in light of the other evidence of his guilt. These assignments of error have no merit.

[5] Defendant finally contends that the trial court erred in refusing to permit defendant's counsel to argue to the jury concerning defendant's failure to testify. The rule in North Carolina is that neither the counsel for the State nor counsel for the defendant is

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allowed to comment on the failure of the defendant to testify. "To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation the statute [G.S. § 8-54] was intended to prevent." *State v. Bovender*, 233 N.C. 683, 689-90, 65 S.E. 2d 323, 329 (1951); *State v. Artis*, 9 N.C. App. 46, 175 S.E. 2d 301 (1970). In his charge to the jury, the trial judge properly instructed the jury that defendant had a right to elect not to testify, and that no unfavorable inference could be drawn therefrom. This assignment of error has no merit.

Because of our disposition of this case, it is unnecessary to discuss defendant's remaining assignment of error.

With respect to the charge of felonious larceny of goods with a value in excess of \$200, the defendant had a fair trial free from prejudicial error.

Defendant was found guilty of separate offenses of felonious entry with intent to commit larceny and felonious larceny. A single judgment of imprisonment was rendered on the verdict. Since we hold that judgment as of nonsuit should have been granted only as to the charge of felonious entry, the single judgment must be vacated and remanded for a proper judgment upon the guilty verdict in the charge of felonious larceny. *State v. Hardison*, 257 N.C. 661, 127 S.E. 2d 244 (1962); *State v. Wingo*, 30 N.C. App. 123, 226 S.E. 2d 221 (1976).

Vacated and remanded for proper judgment on the charge of felonious larceny.

Judges VAUGHN and ARNOLD concur.

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PHYLLIS HARPER LEDWELL AND AMERICAN MOTORISTS INSURANCE COMPANY v. PHILLIP BERNARD BERRY, BY HIS GUARDIAN AD LITEM ROBERT A. BRINSON

No. 7718SC976

(Filed 19 December 1978)

Parent and Child § 2.1— action by minor child against parent—automobile accident—statute abrogating parental immunity—constitutionality

The statute abrogating the doctrine of parent-child immunity in an action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle, G.S. 1-539.21, does not create an arbitrary classification in violation of the equal protection clauses of Art. I, § 19 of the N.C. Constitution and the Fourteenth Amendment of the U.S. Constitution.

APPEAL by plaintiffs from *Lupton, Judge*. Judgment entered 13 October 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 August 1978.

This is a declaratory judgment action pursuant to the Uniform Declaratory Judgment Act which has been adopted in this state and codified as Article 26, Chapter 1 of the General Statutes. The purpose of the action is to test the constitutionality of G.S. 1-539.21 which provides:

The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

The complaint alleges that the minor defendant has filed an action against his mother in the District Court of Guilford County for personal injuries allegedly incurred by him as the result of the negligent operation of a motor vehicle. The plaintiffs allege further that they desire to plead the doctrine of parent-child immunity in the action brought in the District Court of Guilford County, but are barred from doing so by G.S. 1-539.21. The plaintiffs ask that this section be declared unconstitutional as depriving them of equal protection of the law in violation of the Constitutions of the United States and the State of North Carolina. Judge Harvey Lupton held that the statute is constitutional and dismissed the action.

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Tuggle, Duggins, Meschan, Thornton and Elrod, P.A., by Joseph E. Elrod III and Kenneth R. Keller, for plaintiff appellants.

Tate and Bretzmann, by Raymond A. Bretzmann, for defendant appellee.

WEBB, Judge.

We hold that Judge Lupton was correct and affirm the judgment.

The plaintiff challenges the statute on the ground that it creates an arbitrary classification to which the doctrine of parent-child immunity does not apply and thus violates the equal protection clauses of the North Carolina Constitution, art. 1, § 19, and the Fourteenth Amendment of the United States Constitution.

The police power of the state is an inherent power of its sovereignty and it may be exercised by the General Assembly in the regulation of individual conduct. Any law adopted by the General Assembly must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree in comparison with the probable public benefit. *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 226 S.E. 2d 498 (1976). The equal protection clauses of the United States Constitution and the Constitution of North Carolina require that in making classifications such as the Legislature has made in this case there be no discrimination, that is, there must be some reasonable relation between the class created and the legislative end to be obtained. *Glusman v. Trustees and Lamb v. Board of Trustees*, 281 N.C. 629, 190 S.E. 2d 213 (1972), *vacated*, 412 U.S. 947, 37 L.Ed. 2d 999, 93 S.Ct. 2999 (1973); *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972), and *Association of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E. 2d 357 (1973). The plaintiffs do not argue that the removal of a common law immunity from a legal action exceeds the state's police power. Their contention is that its removal only for the class enumerated by G.S. 1-539.21 violates the equal protection clause in that there are others similarly situated who do not receive equal treatment. They contend that by not removing the immunity from suits by parents against unemancipated minor

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children or from suits by unemancipated minors against parents where no automobile is involved, the General Assembly has not enumerated a class based on a reasonable distinction.

We hold that the class recognized by the General Assembly is based on a reasonable distinction. As regards the exclusion from the class of accidents which do not involve motor vehicles we believe the motor vehicle problem in this state is such that the Legislature should be free to attack the evils brought about by accidents on the highways without addressing the whole field of negligence actions. We believe it is less than realistic to hold that the problem of automobile accidents is not sufficiently large to acquire a uniqueness of its own. As regards the exclusion from the class of suits by unemancipated minor children against their parents, we believe this distinction is self-evident. Parents have the right and duty to train and control unemancipated minor children. This difference is sufficient to keep the distinction made by the General Assembly from being arbitrary. We believe the class enumerated by the General Assembly meets the test as propounded by Chief Justice Bobbitt in *Glusman v. Trustees* and *Lamb v. Board of Trustees*, *supra*, at 638:

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"

The plaintiff further argues against the wisdom of the statute in that it might promote a multiplicity of suits. We feel this is an argument which should be addressed to the Legislature.

Affirmed.

Judges MORRIS and HEDRICK concur.

In re Reed

IN THE MATTER OF DANNY REED, RESPONDENT

No. 7817DC618

(Filed 19 December 1978)

Insane Persons § 1 — petition for commitment — insufficiency of affidavit

An affidavit in a petition for involuntary commitment stating that respondent "is believed to have been on drugs for a number of years," that he "is so mixed up," and that he "is now at a place where he is dangerous to himself" was insufficient to establish reasonable grounds for the issuance of a custody order.

APPEAL by respondent from *Allen (Claude W.), Judge*. Ordered entered 9 March 1978 in District Court, GRANVILLE County, transferred to ROCKINGHAM County in accordance with a directive from the Administrative Office of the Courts. Heard in the Court of Appeals 15 November 1978 in Winston-Salem.

On the affidavit of his cousin, respondent was taken into custody. At his commitment hearing, he moved to dismiss on the ground that the petition for commitment was so vague as to violate both the statutory standard and due process, so that there could have been no finding of probable cause for issuance of the custody order. The trial judge agreed that there was an absence of fact in the petition for commitment and that he did not know what the statements in the petition meant, but he reserved ruling on the motion until after he had heard the evidence in the case, "in the hopes that the evidence would elucidate the meaning of the Petition." At the close of the evidence, the judge denied respondent's motion and ordered his commitment. Respondent appeals.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

Susan Freya Olive, for respondent appellant.

ERWIN, Judge.

G. S. 122-58.3 sets out the procedure by which a person may be involuntarily committed to a treatment facility. The statute provides that a person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others may appear before the appropriate officer and execute an af-

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fidavit to that effect and petition for issuance of a custody order. "The affidavit shall include the facts on which the affiant's opinion is based." G.S. 122-58.3(a). "If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others," he shall issue a custody order. G.S. 122-58.3(b). Seeking to have respondent committed, the petitioner here stated in her affidavit:

"2. That the respondent is:

☒ a mentally ill or inebriate person who is imminently dangerous to himself or others.

The facts upon which this opinion is based are as follows: Respondent is believed to have been on drugs for a number of years. He is so mixed up. He is now at a place where he is dangerous to himself."

Respondent argues that this is insufficient to satisfy either the statute or due process. We agree.

The statute clearly requires that the affidavit contain "*the facts on which the affiant's opinion is based.*" (Emphasis added.) Here, no facts appear in the petition. First appears merely a statement of belief without an indication of whether the condition presently exists, or of any result of the condition that might indicate that respondent is "imminently dangerous." The trial judge himself "agreed that only the phrase 'He is so mixed up' *even approached* being a statement of fact, and that . . . it was a vague phrase and he did not know what it meant." (Emphasis added.) The third sentence is clearly a conclusion of the affiant, and not a fact.

In *Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E. 2d 209 (1970), *cert. denied*, 277 N.C. 458, 178 S.E. 2d 225 (1971), this Court considered a portion (since repealed) of our involuntary commitment law which set out the procedures for emergency hospitalization and required that the committing physician's statement be sworn to. The defendant's physician testified that he did not take an oath at the time he signed his statement. We said:

"We are of the opinion . . . that the Legislature meant exactly what it says. . . . Since the statute was not complied

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with, plaintiff was deprived of her liberty without legal process.

Taking a person without the intervention of any court proceeding . . . to a State Hospital for examination and treatment is a drastic procedure. . . .

There being a statute which provides for a drastic remedy, it is incumbent upon all that use it to do so with care and exactness, even though the user may think it 'impractical.' "

Id. at 497, 177 S.E. 2d at 213. Here, the determination by a neutral officer of the court that reasonable grounds exist for the issuance of a custody order is the "court proceeding" required by the Legislature in this "drastic remedy."

"Reasonable grounds" has been found to be synonymous with "probable cause," *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974), and our courts have held that "[p]robable cause cannot be shown 'by affidavits which are purely conclusory. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp. . . .'" *State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E. 2d 752, 756 (1972), quoting *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The United States Supreme Court has recognized that the necessity for the protection afforded by a neutral determination of probable cause arises in civil as well as criminal contexts, see *Marshall v. Barlow's, Inc.*, --- U.S. ---, 56 L.Ed. 2d 305, 98 S.Ct. --- (1978), and that there is a real potential for deprivation of due process in commitment proceedings. See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940). A commitment order is essentially a judgment by which a person is deprived of his liberty, *In re Wilson*, 257 N.C. 593, 126 S.E. 2d 489 (1962), and as a result, he is entitled to the safeguard of a determination by a neutral officer of the court that reasonable grounds exist for his original detention just as he would be if he were to be deprived of liberty in a criminal context. We find that the petition here satisfied neither statutory nor due process requirements, and so was insufficient to establish reasonable grounds for the issuance of a custody order.

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The judgment of the trial court is reversed, and the order of commitment stricken.

Judges PARKER and MARTIN (Robert M.) concur.

GOLF VISTAS, INC. AND THE LAWN AND TENNIS CLUB OF NORTH CAROLINA, INC. v. MORTGAGE INVESTORS OF WASHINGTON, AND MOSLEY G. BOYETTE, JR.

No. 7820SC664

(Filed 19 December 1978)

Mortgages and Deeds of Trust § 25—foreclosure under power of sale—hearing before clerk—all matters not settled therein—injunctive relief appropriate

In an action to enjoin foreclosure where plaintiffs alleged that they were not in default and that a portion of the property sought to be foreclosed had been released from the deed of trust by the lender, the trial court erred in denying a preliminary injunction and finding that the matters complained of should be raised before the Clerk of Superior Court since the hearing before the Clerk provided for in G.S. 45-21.16 was not intended to settle all matters in controversy between the parties, and plaintiffs could properly seek injunctive relief pursuant to G.S. 45-21.34.

APPEAL by plaintiffs from *Walker (Hal H.)*, Judge. Order entered 9 March 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 19 October 1978.

On 3 February 1978, plaintiffs brought this action to enjoin defendants from foreclosing upon certain property in Moore County. Previously, on 18 January 1978, defendants had instituted a special proceeding before the Clerk of Superior Court to foreclose upon the property under a deed of trust dated 11 October 1974, which secured a \$2,329,600 loan from defendant Mortgage Investors to plaintiffs. Plaintiffs sought to enjoin the special proceeding, because they alleged they were not in default, and because a portion of the property sought to be foreclosed had been released from the deed of trust by the lender.

Judge McConnell issued a temporary restraining order on 6 February 1978 enjoining the proceeding. On 9 March 1978, the lender moved to dissolve the temporary restraining order.

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Judge Hal H. Walker entered an order, filed 16 March 1978, denying a preliminary injunction and finding that the matters complained of should be raised before the Clerk of Superior Court. A supplemental order was filed on 24 March 1978 which permitted the temporary restraining order to continue until resolution of plaintiffs' appeal.

Leath, Bynum, Kitchin & Neal, by Fred W. Bynum, Jr., for plaintiff appellants.

Glassie, Pewett, Beebe & Shanks, Washington, D.C., by Thomas G. McGarry and James Bruce Davis; Boyette & Boyette, by M. G. Boyette, Jr.; Powe, Porter, Alphin & Whichard, by E. K. Powe and Niccolo A. Ciompi; for defendant appellees.

ERWIN, Judge.

Plaintiffs assign error to the refusal of the trial court to grant the preliminary injunction. They contend that there are issues which should be passed upon by a jury before the Clerk determines whether defendants are entitled to proceed with foreclosure. Defendants argue that G.S. 45-21.16 gives plaintiffs the right to raise their alleged defenses in the special proceeding before the Clerk and, upon appeal, before a judge of the Superior Court. Thus, defendants maintain that plaintiffs have an adequate remedy at law, and the trial court properly refused to grant the preliminary injunction.

G.S. 45-21.16(d) provides in pertinent part:

"The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. . . . If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument . . . The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo."

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In the recent case of *In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978), the issue before this Court was whether a Superior Court Judge is authorized to invoke equity jurisdiction in a hearing *de novo* on appeal pursuant to the above statute or is limited to hearing the same matters which were before the Clerk of Superior Court. We noted therein that the injunctive relief provided for in G.S. 45-21.34 is available prior to the confirmation of the foreclosure sale. Construing the intent of the Legislature and considering *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), we held, with Judge Clark speaking for this Court:

"The notice and hearing required by G.S. 45-21.16 were designed to enable the mortgagor to utilize the injunctive relief already available in G.S. 45-21.34. The hearing [before the Clerk or *de novo* in Superior Court] was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief.

* * *

... The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34." (Citations omitted.) 38 N.C. App. at 94, 247 S.E. 2d at 429.

We hold, therefore, that the trial court erred in concluding that the matters raised herein could only be raised at the hearing before the Clerk. It does not inevitably follow, however, that plaintiffs herein will prevail. We hold, simply, as we did in *In re Watts*, *supra*, that the hearing provided for in G.S. 45-21.16 was not intended to settle all matters in controversy between the parties and that the appropriate means for invoking equity jurisdiction is an action pursuant to G.S. 45-21.34. In part, plaintiffs base this action on the contention that they are not in default. The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. *Realty Corp. v. Kalman*, 272 N.C. 201, 159 S.E. 2d 193 (1967). Likewise, we believe that plaintiffs' contention that certain portions of the property have been released from the deed of trust, if shown to be true, would entitle them to restrain a foreclosure proceeding which purports to seek foreclosure of all of the property under the original deed of trust.

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We conclude, therefore, that the temporary restraining order should be continued to the hearing, *see Realty Corp. v. Kalman, supra*, and that plaintiffs may raise the issues herein under the provisions of G.S. 45-21.34.

The orders of the trial court are vacated, except insofar as they continue the temporary restraining order, and the cause is remanded for a rehearing consistent with our ruling herein.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. CURTIS ROY HEATON

No. 7824SC678

(Filed 19 December 1978)

Weapons and Firearms § 3— discharging firearm into occupied building—insufficiency of evidence

The State's evidence was insufficient for the jury in a prosecution for feloniously discharging a firearm into an occupied building in violation of G.S. 14-34.1 where it tended to show only that defendant's car blocked the narrow road on which the prosecuting witness was traveling; defendant refused to move his car, and the prosecuting witness rammed defendant's car, knocked it out of the way, and drove to a neighbor's house where he called the sheriff; an officer gave defendant a parking citation; a gunshot was fired into the prosecuting witness's home while the officer was standing therein; the officer testified the gunshot sounded like it was fired from a .22 caliber rifle; defendant was found in bed wearing his shirt, pants and socks; defendant had injured his hand and blood was found on his clothing; officers followed a trail of blood from defendant's front porch to a point 100 feet from where defendant's car was left after the collision; one walking from defendant's house to his car would follow the same route as would be followed to the house of the prosecuting witness; defendant told officers he had walked back to his car to lock it and had fallen and injured his hand; and a box of .22 caliber bullets was found on the floor of a barn 100 yards from defendant's house.

APPEAL by defendant from *Smith (David I.)*, Judge. Judgment entered 10 April 1978 in Superior Court, AVERY County. Heard in the Court of Appeals 14 November 1978.

Defendant was indicted and tried on the charge of feloniously discharging a firearm into an occupied building in violation of G.S.

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14-34.1. At trial defendant moved for judgment of nonsuit after the State's evidence and renewed the motion at the conclusion of all the evidence. Each motion was denied by the trial court. Upon the jury's verdict of guilty as charged, judgment was entered sentencing defendant to an eight-year prison term. Defendant appeals.

Attorney General Edmisten, by Associate Attorneys Thomas H. Davis, Jr. and Jane Rankin Thompson, for the State.

William B. Cocke, Jr., for defendant appellant.

MORRIS, Chief Judge.

Defendant assigns as error the trial court's failure to enter judgment of nonsuit. It is well settled that upon motion for nonsuit evidence, whether direct or circumstantial, presented by the State and evidence presented by the defendant which may tend to strengthen the State's case is to be considered in the light most favorable to the State while giving the State every reasonable inference to be drawn therefrom. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977). The evidence taken in the light most favorable to the State is summarized below.

The prosecuting witness, William Edward Gardner, a man suffering from coronary disease, drove to an Avery County establishment known as Times Square at about 1:15 a.m. on 13 December 1977, to pick up his wife. Shortly after he arrived there, defendant and another individual drove their cars into the same parking lot in which Gardner's car was parked, and stopped 20 or 30 feet away. Mr. Gardner testified that he overheard defendant say to his companion, "We'll pin him in." Defendant and his companion left the parking lot. When Mrs. Gardner came to the car her husband told her about the statement he overheard. Mr. Gardner was "nervous and upset."

Mr. Gardner left Times Square and proceeded along Curtis Creek Road in Avery County to return home. The road was very icy. Before reaching his home he had to stop for the defendant's companion's car which became stuck when it was unable to negotiate the slippery, narrow gravel road. Defendant's own car was parked across the road in such a manner that Gardner could

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not get around both cars on the narrow road. Defendant would not move his vehicle so Gardner charged it knocking it out of the way, and drove to a neighbor's house where he called the sheriff.

Trooper Joe Shook investigated the collision incident and issued defendant a parking citation. Afterwards, at about 3:00 a.m. while Trooper Shook was standing in the living room of Mr. Gardner's home, a bullet was fired through the kitchen door and struck the chimney in the living room. No one was seen outside the house when the shot was fired. A metal fragment which Mr. Gardner asserted was the bullet fired by defendant was found sometime later in the Gardner's vacuum cleaner. Its caliber was not identified. No spent cartridge casings were found. Trooper Shook testified that the gunshot sounded like it was fired from a .22 caliber rifle.

After the shooting Trooper Shook and Deputy Sheriff Barlowe returned to the defendant's home. Defendant was found in bed wearing his shirt, pants, and socks. Defendant had injured his right hand and blood was found on his clothing. The officers followed a trail of blood from defendant's front porch back in the direction of defendant's car and Gardner's home. The spots of blood began about 100 feet from where defendant's car was left after the collision. Defendant told the officers that he had walked back to his car to lock it and had injured his hand when he fell on the icy road. Curtis Creek Road and those roads branching from it are so situated that one walking from defendant's house to his car would be taking the same route as would be followed if one were walking to the Gardner house although both houses are not on the same road.

The officers searched a barn about 100 yards from defendant's house and found a box of untarnished .22 caliber bullets lying on the floor. No weapon was found. Deputy Barlowe testified that defendant's mother said, when they arrived at the house, that "he was in the bed but he was strange, that he had lost his mind or something."

This evidence is insufficient to withstand defendant's motion for judgment of nonsuit. The State's evidence is entirely circumstantial. The State's evidence must establish that (1) a crime has been committed and (2) that it was committed by the person charged. *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977);

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State v. Clyburn, 273 N.C. 284, 159 S.E. 2d 868 (1968). The State has failed to produce evidence sufficient to indicate that defendant fired the shot. Although the evidence raises a strong suspicion of guilt, we do not think it is sufficient to withstand a motion for nonsuit. See *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967). The evidence is simply not sufficient to take the strong suspicion it does raise from the realm of speculation and conjecture. Nor can the presence of motive for the shooting without more carry the case to the jury. *State v. Chapman, supra*; *State v. Jarrell*, 233 N.C. 741, 65 S.E. 2d 304 (1951).

One can do no more than speculate that defendant fired the gunshot and that he injured himself fleeing the scene of the crime. The trial court erred in failing to allow defendant's motion for nonsuit.

Because we hold that defendant was entitled to judgment of nonsuit, we need not consider errors in the charge to the jury.

Reversed.

Judges HEDRICK and MARTIN (Harry C.), concur.

CITY OF HICKORY v. CATAWBA VALLEY MACHINERY COMPANY

No. 7725DC1036

(Filed 19 December 1978)

Municipal Corporations § 31— violation of zoning ordinance—action to enjoin—collateral attack on proceeding before Board of Adjustment improper

In an action by plaintiff city to require defendant to remove a canopy which allegedly violated plaintiff's zoning ordinance, defendant could not attack the proceedings before the city administrative boards since defendant had failed to seek judicial review of the actions of the Board of Adjustment by way of petition for writ of certiorari to the superior court as provided by law, and an attack of the proceedings as a defense to the city's action for injunctive relief would constitute an impermissible collateral attack.

APPEAL by defendant from *Edens, Judge*. Judgment entered 17 May 1977 in District Court, CATAWBA County. Reheard in the Court of Appeals 28 November 1978.

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This case was first heard in this Court on 21 September 1978. The opinion dismissing the appeal was filed 17 October 1978. A petition to rehear was filed 21 November 1978. An order for rehearing was entered 21 November 1978.

The problem upon the first hearing of this case was that the record on appeal disclosed failures of appellant to follow the Rules of Appellate Procedure. From the exhibits filed with the petition to rehear it is established that appellant did indeed follow the Rules of Appellate Procedure with respect to service and filing of the record on appeal but failed to include the extension orders in the record on appeal so that the hearing panel of this Court could see that its various actions were timely taken under the extension orders.

We go now to the merits of the appeal.

Tate, Young & Morphis, by E. Murray Tate, Jr., for the plaintiff.

Rudisill & Brackett, by J. Steven Brackett, for the defendant.

BROCK, Chief Judge.

The City of Hickory instituted this action to require defendant to remove a canopy which allegedly violated the City's zoning ordinance. Prior to trial the parties stipulated: That defendant's property is zoned "general business"; that such zoning prohibits extensions of canopies or other structures into the "front yard", the space between the main building and the street or highway; that when the zoning ordinance was adopted in January 1967 defendant already had a canopy which constituted a permissible non-conforming use; that sometime prior to October 1973, defendant removed the canopy and within 360 days replaced it with a larger canopy; that defendant did not secure a building permit before constructing the new canopy; and that on 25 October 1973 defendant was notified by the City that defendant's canopy was in violation of the zoning ordinance.

At the conclusion of the hearing the trial judge determined that defendant's construction of the new canopy was in violation of the zoning ordinance and defendant was ordered to remove the canopy. Defendant appealed.

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Most of the defendant's argument on this appeal can be disposed of by pointing out that it failed to seek judicial review of the actions of the Board of Adjustment by way of petition for writ of certiorari to the superior court as is provided by law. It may not, in the city's action for injunctive relief, attack the proceedings before the city administrative boards. Such constitutes an impermissible collateral attack. Defendant failed to exercise the remedies available to it under the zoning ordinance and may not as a defense to the city's action for injunctive relief collaterally complain that the city denied it due process of law. It seems that defendant chose to ignore the city's actions and undertook by inaction to continue the use of its canopy in violation of the zoning ordinance. Defendant does not contend that its canopy does not violate the zoning ordinance. It undertakes to argue in this lawsuit that the court should not grant relief to the city because the city would not allow its canopy to remain as a permissible non-conforming use.

Defendant argues that the trial court should have granted its motion for dismissal at the close of the city's evidence, that the court should not have found that its new canopy was in fact larger than the original one, and that the court should not have found that the new canopy was violative of the zoning ordinance. In these arguments defendant seems to contend that the underlying error was that the court conducted a trial *de novo* rather than limiting itself to a review of the administrative record. There is no merit in this contention. The administrative record was not before the court for review in this action. If defendant desired a judicial review of the administrative record it should have sought it by petition for writ of certiorari as by law provided. In this action by the city under G.S. 160A-389 for injunctive relief the proper function of the court was to determine whether a violation of the ordinance existed warranting injunctive relief.

Defendant's argument that the trial court failed to make findings of fact and conclusions of law is clearly not supported by the record and merits no discussion.

Defendant argues that the trial court was in error in finding that defendant was not denied its due process right to be heard before the various administrative officials and boards. We consider this finding by the trial court to be surplusage because the

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question was not properly before it. A quotation from *Durham County v. Addison*, 262 N.C. 280, 283, 136 S.E. 2d 600, 603 (1964) will serve to dispose of this argument:

"The decision of the Board of Adjustment is not subject to collateral attack. As stated by Adams, J., in *S. v. Roberson*, 198 N.C. 70, 72, 150 S.E. 674: 'When . . . the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of *certiorari* for the purpose of having the validity of the ordinances finally determined in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment.' The decisions of the Board of Adjustment are final, subject to the right of courts on *certiorari* 'to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority.'" (Emphasis added.)

In this case the trial judge was very lenient with defendant. The trial judge stayed the effectiveness of his injunctive order specifically to give defendant an opportunity to seek relief through proper channels, the administrative officials and boards. The record before us does not disclose the results of any efforts by defendant, or if it made any effort.

In any event, defendant has been afforded its rights under the ordinance and statutes. From the record before us it simply has failed to exercise them.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

Thompson v. Construction Co.

CHARLES W. THOMPSON AND WIFE, AVIS L. THOMPSON v. TOWN AND COUNTRY CONSTRUCTION COMPANY, INC.

No. 7817SC144

(Filed 19 December 1978)

1. Trial § 9.2— mistrial—when appealable

An order declaring a mistrial is appealable only if the trial judge has abused his discretion.

2. Trial § 9.2; Rules of Civil Procedure § 41.1— mistrial to further ends of justice—standards for voluntary dismissal

The standards governing the granting of a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(2) upon a finding that justice so requires should also be applied in ascertaining whether a judge was warranted in declaring a mistrial "to further the ends of justice."

3. Trial § 9.2— mistrial—ends of justice—plaintiffs unrepresented by counsel

In an action for breach of contract by failing to construct a house in a workmanlike manner, the trial court did not err in ordering a mistrial "to further the ends of justice" when plaintiffs failed to present competent evidence of specific defects in the house and of damages because they were unrepresented by counsel where the evidence offered was sufficient to show that plaintiffs may have a valid claim which could be effectively presented to the court with the assistance of counsel.

APPEAL by defendant from *Crissman, Judge*. Order entered 6 October 1977 in Superior Court, SURRY County. Heard in the Court of Appeals in Winston-Salem on 15 November 1978.

On 6 August 1974, plaintiffs brought an action alleging that defendant had built a house for them, had breached the contract and had failed to construct the house in a reasonable workmanlike manner and that many of the materials used were unsuitable and defective. The defendant generally denied the allegations and counterclaimed for moneys due for additional work done.

Plaintiffs were not represented by counsel at the trial. The plaintiffs' evidence tended to show that the parties entered into a contract in 1972 for the defendant to build a home for the plaintiffs. Since the house has been completed, water has been leaking into the ceiling, several pipes have broken, and the house has warped. There is a smell of smoke in the house and plaintiffs have cut off the water to keep the water from entering the electrical units. Mrs. Thompson testified that water leaked through the

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chandeliers and that within the first year after the house was built the whole living room ceiling dropped. The defendant tried to jack the ceiling up but failed to correct the problem. Mrs. Thompson also testified that the wood was not in straight lines around the eaves. At the close of plaintiffs' evidence, defendant moved to dismiss the plaintiffs' action for failure to prove the allegations in the complaint. Judge Crissman denied defendant's motion, withdrew a juror and declared a mistrial, "for fear that something unfair will be done where they are concerned with their lawsuit. . . ."

From the order denying defendant's motion and declaring a mistrial, defendant appeals.

Malone, Johnson, DeJarmon & Spaulding by C. C. Malone, Jr. and Albert L. Willis for plaintiff appellees.

Folger & Folger by Larry Bowman for defendant appellant.

CLARK, Judge.

Since it is apparent that the trial judge denied defendant's motion for directed verdict in anticipation of withdrawing a juror and declaring a mistrial, we will first determine whether the order declaring a mistrial is appealable.

[1] An order declaring a mistrial is appealable only if the trial judge has abused his discretion. See, *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19 (1957). A judge may withdraw a juror and declare a mistrial when "necessary to prevent the defeat of justice or in the furtherance of justice. . . ." 76 Am. Jur. 2d, Trial, § 1073; 2 McIntosh, N.C. Practice & Procedure, § 1548 (1956). *State v. Tyson*, 138 N.C. 627, 50 S.E. 456 (1905). The trial judge is "clothed with this power because of his learning and integrity, . . . [T]he law intends that the Judge will exercise it to further the ends of justice, . . ." *Moore v. Edmiston*, 70 N.C. 470, 481 (1874).

There are no North Carolina cases which hold that a mistrial may be ordered "to further the ends of justice" when a litigant has failed to present competent evidence because he was not represented by counsel. However, the North Carolina Supreme Court has indicated what standards should be applied in ordering a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(2) "upon

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finding that justice so requires." *King v. Lee*, 279 N.C. 100, 106, 181 S.E. 2d 400, 404 (1971). That Rule provides:

"By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. . . ."

Rule 41(a)(2) is designed "to take care of the hardship case where, for quite legitimate reasons, the plaintiff is unable to press his claim." Official Comment, G.S. 1A-1, Rule 41(a)(2).

In *King v. Lee*, *supra*, petitioners' counsel proceeded at trial under a misapprehension of the applicable law. The North Carolina Supreme Court indicated that on remand the trial judge could order a voluntary dismissal pursuant to Rule 41(a)(2), if a judgment adverse to petitioners would "defeat justice." 279 N.C. at 107, 181 S.E. 2d at 404. The court noted that in determining whether or not to order a dismissal, the trial court should consider the likelihood that the petitioners could present evidence entitling him to relief.

[2] The judge is clothed with the power to declare a mistrial for the same reason that he is empowered to order a voluntary dismissal. It follows that the standards governing the granting of Rule 41(a)(2) dismissals should also be applied in ascertaining whether a judge was warranted in declaring a mistrial "to further the ends of justice."

[3] In the case *sub judice*, the plaintiffs offered evidence tending to show the results of construction defects without describing the defects which would show that the house was constructed in an unworkmanlike manner, and though in their complaint they prayed for damages, they offered no evidence of money damage, both testifying that they did not want money but only wanted the defects repaired. The evidence offered was sufficient to show that the plaintiffs may have a valid claim which could be effectively presented to the court with the assistance of competent counsel.

Applying the standards set forth by the Supreme Court in *King*, it is clear that the trial judge did not abuse his discretion in declaring a mistrial.

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Since the trial judge was warranted in ordering the mistrial, we do not deem it necessary to consider defendant's contention that the directed verdict was improvidently denied.

Affirmed.

Judges MITCHELL and WEBB concur.

STATE OF NORTH CAROLINA v. PETE PATTERSON AND BARBARA HOUGH

No. 7820SC796

(Filed 19 December 1978)

Criminal Law § 113.6—two defendants—instructions—separate verdicts as to each

In a prosecution for common law larceny, the trial court's two statements with respect to considering the guilt of each defendant separately were insufficient to cure the court's earlier erroneous instruction that, if the jury found that either defendant had committed the acts charged, then both would be guilty.

APPEAL by defendants from *Walker (Hal H.)*, Judge. Judgment entered 18 May 1978 in Superior Court, UNION County. Heard in the Court of Appeals on 6 December 1978.

Defendants were charged in separate bills of indictment proper in form with common law robbery. Upon their pleas of not guilty, the State introduced evidence tending to show the following:

On 24 March 1978, a Friday at around 4:30 p.m., Willie Craig cashed a paycheck in Monroe, North Carolina, and went shopping at Belk's department store. After making his purchases and leaving the store, Craig saw the defendants outside the store and talked with them briefly. He then took a taxi to First Street and purchased some items at a store there. After he left the store, he again saw the defendants who asked him to go get a drink with them. Defendant Patterson then grabbed him around the throat from behind and defendant Hough took Craig's billfold containing sixty dollars from his pocket and a package containing some clothes he had bought that day. Defendant Hough ran away, and, when Craig turned around, defendant Patterson hit him in the

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mouth. A few days later, Craig saw the defendants again. They asked him if he had taken out a warrant on them and he replied that he had. They then offered to give him his sixty dollars back if he would take back the warrant.

Defendants introduced evidence tending to show the following:

Defendants saw Craig outside Belk's department store on the afternoon in question when they had gone to the public utilities office in Monroe. After making a deposit to get the water and power turned on at their residence, defendants returned home. They arrived at their residence around 5:00 or 5:30 p.m. and shortly thereafter a man came and turned on their water and electricity. Defendants never went to First Street that day and never saw Craig again that day. Defendant Patterson's employer suggested that they give Craig sixty dollars, but Patterson refused. Defendant Hough offered to give Craig sixty dollars but maintained that they had not robbed him. Craig refused to take the money. Bruce Helms, an employee of the city, testified that he arrived at defendants' residence to turn on the water and electricity about 5:30 p.m. on the day in question. While he was there, he saw defendant Patterson and heard a woman's voice inside the house.

The jury found both defendants guilty as charged. Defendant Patterson received a sentence of four to five years and defendant Hough received a sentence of three to five years. Defendants appealed.

Attorney General Edmisten, by Associate Attorney Douglas A. Johnston, for the State.

William H. Helms for defendant appellants.

HEDRICK, Judge.

The sole question presented by this appeal is whether the trial court committed prejudicial error in its charge to the jury by instructing that if it found that either defendant had committed the acts charged then both would be guilty. Defendants assign as error the following portion of the court's charge:

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So I charge you that if you find all of the essentials I am about to give you in regard to common law robbery existed on this day, the 24th of March 1978, and that Pete Patterson and Barbara Hough acted either by himself or herself, or acted together with the common design of relieving Craig of his money, of any value, without his consent and by force or threats of force, did take his money, then they would both be guilty of the crime of common law robbery, if you find that the essentials were present.

...

I charge you that for you to find Pete Patterson and the defendant, Barbara Hough, guilty of common law robbery, the State of North Carolina must prove six things beyond a reasonable doubt, as I have defined that term to you. First, that either defendant took the money, or that they both took the money from the person of Willie Craig on the 24th of March, 1978; second, that the defendant or either of them carried away the property, that is, took it from the person of Craig, and removed it from his person and carried it away; third, that Craig did not voluntarily agree or consent to the taking and carrying away of the money; fourth, that at the time the defendant, Patterson, and defendant, Hough, intended to deprive Craig of its use permanently; fifth, that the defendants knew that he or she was not entitled to take the property; and sixth, that the taking of the property was by violence or by placing Craig in fear.

Numerous cases in North Carolina have held that upon the joint trial of two or more defendants, it is reversible error for the court to give a charge that is susceptible to the construction that the jury should convict all of the defendants if it finds one of them guilty. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Lockamy*, 31 N.C. App. 713, 230 S.E. 2d 565 (1976); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). When defendants are charged with identical offenses and the evidence adduced at the consolidated trial is the same as to each defendant, the trial judge is not required to give wholly separate instructions as to each defendant; however, he must either give a separate final mandate as to each defendant or otherwise clearly

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instruct the jury that the guilt or innocence of one defendant is not dependent on the guilt or innocence of a codefendant. *State v. Lockamy, supra*.

In the present case, the trial judge after giving the above quoted instructions, charged the jury:

Your decision must be unanimous as to each defendant, and your verdict will be taken separately as to each defendant.

You may find each defendant guilty as charged of common law robbery, or, not guilty. There are two possible verdicts as to each defendant.

While we are not unmindful of the rule that the charge must be considered as a whole, and, if considered in that light, it fairly and accurately presents the law, an isolated expression that is technically inaccurate will afford no ground for reversal, *State v. Tomblin, supra*, we believe these two sentences are not sufficient to cure the erroneous portion of the charge. Because the charge in the present case was susceptible to the interpretation that the jury must find either both defendants guilty or both defendants not guilty, defendants are entitled to a new trial.

New trial.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. ARTHUR KELLY

No. 7829SC723

(Filed 19 December 1978)

1. Criminal Law § 92.4— possession of stolen property—consolidation of charges for trial

Two charges against defendant for felonious possession on the same date of property which had been stolen on different dates were properly consolidated for trial.

2. Criminal Law § 71— defendant “hiding”—shorthand statement of fact

Testimony by a State's witness that he found defendant “hiding” in the bushes was competent as a shorthand statement of fact.

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3. Receiving Stolen Goods § 1— possession of stolen property—proof of stealing by another not necessary

On a charge of possession of stolen property in violation of G.S. 14-71.1, it is not necessary for the State to prove that someone other than the defendant stole the property.

APPEAL by defendant from *Walker (Ralph), Judge*. Judgment entered 19 April 1978 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 28 November 1978.

Defendant was indicted and convicted of two charges of felonious possession of stolen property. N.C. Gen. Stat. 14-71.1. The cases were consolidated for trial.

Evidence was produced tending to show that about 2 December 1977 there was a breaking or entering into McDowell Agricultural Supply in Marion, North Carolina. A King type wood heater and Jacobsen riding lawn mower were taken. About a week earlier, the shop of Dean Pritchard was broken into and certain motorcycle parts were taken.

Shortly thereafter officers of McDowell County Sheriff's Department went to the home of the defendant for the purpose of serving an order of arrest on someone (not the defendant). No one answered the door although they heard loud music inside the house. On going to the rear of the house, the officers came upon the property described above. Some of it was beside a path at the rear of the house and some in an old outbuilding. The officers brought the property to the Sheriff's Department. The property was identified by the witnesses at the Sheriff's Department and photographs of it introduced into evidence.

The officers returned the next day with a search warrant. The defendant was found "hiding in the bushes behind the shed." He was in honeysuckle vines in a squatting position with his face down on the ground.

Judgments of imprisonment were entered. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

I. C. Crawford for defendant appellant.

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MARTIN (Harry C.), Judge.

[1] Defendant objects to the consolidation of the charges for trial. The indictments charge the defendant with felonious *possession* on 2 December 1977 of stolen property. The indictments alleged, and the evidence indicated, the property was stolen at different times but all possessed by defendant on 2 December 1977. The solicitor could have included both charges in one bill of indictment. There was no error in the consolidation in the discretion of the trial judge.

[2] Defendant contends the court erred in allowing State's witness to testify he found defendant "hiding in the bushes." We disagree. The use of the word "hiding" was a shorthand statement of fact supported by another witness's description of where defendant was found. 1 Stansbury's N.C. Evidence (Brandis Revision, 1973), § 125.

[3] Defendant contends the cases should have been dismissed at the close of the evidence. He argues the evidence fails to show the property was stolen by someone other than defendant. While it is true that a defendant cannot be convicted of *receiving* stolen property which he has stolen himself, such is not the case in a charge of *possession* of stolen property. The concept of "receiving" involves someone other than defendant stealing the property and then transferring possession of it to the defendant. A defendant cannot "receive" property from himself.

N.C. Gen. Stat. 14-71.1, effective 1 October 1977, was apparently passed to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. This could occur where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of possession of recently stolen property. To require the State to prove who committed the larceny as an element of this offense would defeat the obvious intent of the legislature. On a charge of possession of stolen property, it is not necessary that the State prove someone other than the defendant stole the property. See N.C.P.I. Crim. 216.47. See generally Crowell and Farb, 1977 *Legislation Affecting Criminal Law and Procedure* (pt. II), p. 2, Administration of Justice Memoranda, Institute of Government (September 1977). There

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was sufficient evidence to overcome the motion for nonsuit. This assignment of error is overruled.

We have examined defendant's other assignments of error and find no merit in them. Defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS (now Chief Judge) and MITCHELL concur.

JAMES THOMAS SMITH, SR., AND ATLAS RAILROAD CONSTRUCTION COMPANY, A NORTH CAROLINA CORPORATION v. PACIFIC INTERMOUNTAIN EXPRESS COMPANY, A NEVADA CORPORATION

No. 7728SC85

(Filed 19 December 1978)

Process § 12; Rules of Civil Procedure § 4— summons directed to corporate officer—sufficiency of service on corporation

A summons was not fatally defective because it was directed to an officer of the corporate defendant rather than to the corporation itself where the caption of the summons and the complaint clearly showed that the corporation and not the officer was being sued.

APPEAL by defendant from *Lewis, Judge*. Order entered 2 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 November 1978.

On 17 June 1976, plaintiffs instituted this action against the Pacific Intermountain Express Company and James Lee Taylor, Administrator of a deceased employee of the corporation, for damages arising in a truck accident. The plaintiffs attempted to obtain service of process on the corporate defendant by two summonses addressed as follows:

G. A. Sywassink
Vice President in Charge of Operations
PACIFIC INTERMOUNTAIN EXPRESS, INC.
1417 Clay Street
Oakland, California 94600

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and to:

ROBERT ROSS
Terminal Manager
P. 1 E
525 Johnson Road
Charlotte, North Carolina 28206.

On 19 July 1976, both defendants filed a Motion to Dismiss the action on grounds of insufficiency of process. Thereafter, plaintiffs voluntarily dismissed their cause of action against the defendant Taylor.

On 10 August 1976, defendant Express Company answered the complaint and counterclaimed for damages, and on 13 August 1976, the defendant directed interrogatories to the plaintiffs.

At hearing on the defendant Express Company's Motion to Dismiss, the court held that no valid summons had been issued for the defendant, but that the defendant had waived objection to lack of jurisdiction by making a general appearance.

From this order, the defendant appealed. This Court held, in an opinion by Judge Vaughn, that the defendant had not waived his right to contest the trial court's assertion of jurisdiction by filing an answer and counterclaim. *Smith v. Express Co.*, 34 N.C. App. 694, 239 S.E. 2d 614 (1977).

Plaintiffs thereafter filed a Petition for Discretionary Review by the North Carolina Supreme Court. Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, the North Carolina Supreme Court allowed the Plaintiffs' Petition and remanded the case to this Court for further consideration in light of *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978). *Smith v. Express Co.*, 295 N.C. 92, 244 S.E. 2d 260 (1978).

Morris, Golding, Blue & Phillips by James N. Golding for defendant appellant.

John A. Powell for plaintiff appellees.

CLARK, Judge.

In *Wiles, supra*, the North Carolina Supreme Court held that a summons directed to an officer of a corporation is not defective

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if the caption of the summons and the complaint clearly indicate that the corporation and not the registered agent of the corporation was the intended defendant. *See, e.g., Wearing v. Belk Brothers, Inc.*, 38 N.C. App. 375, 248 S.E. 2d 90 (1978); *West v. Reddick, Inc.*, 38 N.C. App. 370, 248 S.E. 2d 112 (1978); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978).

In the case *sub judice*, the defendant concedes, and we agree, that the summons addressed to G. A. Sywassink, Vice President in Charge of Operations, PACIFIC INTERMOUNTAIN EXPRESS, INC., 1417 Clay Street, Oakland, California 94600, coupled with the caption in the summons and the complaint sufficiently indicated that the corporation and not the corporate officer was the defendant. Therefore, under the rule set forth in *Wiles*, the service of process issued to the defendant, Pacific Intermountain Express Company, is valid.

We reaffirm the decision in *Smith v. Express Co.*, 34 N.C. App. 694, 239 S.E. 2d 614 (1977), on the issue of waiver of the defense of lack of jurisdiction.

The trial court's order as to the issue of improper service of process is

Reversed and remanded.

Judges MITCHELL and WEBB concur.

IN THE MATTER OF KATHY GEORGINE CAMPBELL, JUVENILE

No. 7818DC643

(Filed 19 December 1978)

Contempt of Court § 6.2— violation of court order—sufficiency of evidence

Though appellant was not a party to the proceedings in which a juvenile was declared undisciplined and therefore was not bound at that time by the order requiring the juvenile not to associate with him, appellant nevertheless knew of the order, having been served with the judgment, and he could be held in contempt for aiding the minor to disobey the order.

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APPEAL by Steve Murray from *Gentry, Judge*. Judgment entered 19 April 1978 in District Court, GUILFORD County. Heard in the Court of Appeals at Winston-Salem on 15 November 1978.

This is an appeal from an order holding Steve Murray, an adult, in contempt for violating an order entered in a juvenile proceeding. On 27 October 1977, Kathy Georgine Campbell was held to be an undisciplined child by the District Court of Guilford County. She was placed on probation and among the conditions of probation was the following:

"That she not associate with or be found in the company of Steve Murray, nor is she to contact Steve Murray. It is further provided that Steve Murray is not to associate with the said child or permit her to get into his automobile or be in her company, nor is he to contact her by any means."

A copy of this probation judgment was served on Steve Murray.

On 7 March 1978, Steve Murray was served with an order to show cause why he should not be held in contempt for wilfully refusing to comply with the order of the court. After a hearing on 19 April 1978 the court found:

"that on or about the 23rd and 24th of February that Steve Murray did have Kathy Georgine Campbell in his car and was keeping her away from her parents with the knowledge that he was not to associate with her; that Steve Murray did contact the said Kathy Georgine Campbell by letter. . . ."

The court held Steve Murray in contempt. He received an active sentence suspended upon the payment of a \$100.00 fine.

Attorney General Edmisten, by Associate Attorney Steven Mansfield Shaber, for the State.

Assistant Public Defender Michael F. Joseph, for defendant appellant, Steve Murray.

WEBB, Judge.

The appellant concedes there was evidence to support the findings of fact as to his association with the juvenile. He argues first that he was not a party to the proceedings in which Kathy Georgine Campbell was found to be undisciplined and the court

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has no jurisdiction over him. He also argues that if the court did have jurisdiction he was not before the court at the time the original judgment was entered and the court had no power to issue what amounted to a permanent injunction forbidding him to associate with the minor without giving him a chance to be heard.

The State concedes that Steve Murray was not a party to the proceedings in which Kathy Georgine Campbell was declared undisciplined and he was not bound by the order at that time. The State contends, however, that Steve Murray knew of the judgment ordering the minor not to associate with him, having been served with the judgment, and he was in contempt of court for aiding the minor to disobey the order.

We find *In re Hogan*, 24 N.C. App. 51, 209 S.E. 2d 880 (1974) to be persuasive. In that case, the court instructed the jury at 5:00 p.m. not to discuss with anyone during the evening hours the case which they were hearing. A person in the courtroom who heard this instruction contacted one of the jurors that evening in regard to the case. The person who contacted the juror was held in contempt and this was affirmed by this Court. The respondent in that case was not a party to the proceedings, but was nevertheless held in contempt for violating an order of the court of which she was aware.

G. S. 5-1 reads as follows:

Any person guilty of any of the following acts may be punished for contempt:

* * *

- (4) Willful disobedience of any process or order lawfully issued by any court.

Chapter 5 of the General Statutes was replaced by Chapter 5A, effective 1 July 1978. It does not affect the decision of this case. The district court clearly had the authority to order Kathy Georgine Campbell not to associate with Steve Murray. It was a lawful order. Steve Murray knew of this order and wilfully violated it and aided the minor in disobeying it. We hold that when Steve Murray was served with the order forbidding Kathy Georgine Campbell from associating with him and aided her in

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disobeying the order, he wilfully disobeyed a lawful order of the District Court of Guilford County.

Affirmed.

Judges CLARK and MITCHELL concur.

ROBERT CLYDE BENSON v. PATRICIA GAIL BENSON

No. 7823DC268

(Filed 19 December 1978)

Divorce and Alimony § 23.1— wife's action for alimony without divorce and child custody—husband's subsequent custody action—jurisdiction

Where the wife filed a complaint in Anson County on 1 November 1977 seeking alimony without divorce and child custody and support, the court in Wilkes County was without jurisdiction to entertain the husband's action for child custody instituted in Wilkes County on 2 November 1977.

APPEAL by defendant from *Davis, Judge*. Order entered 16 January 1978 in District Court, WILKES County. Heard in the Court of Appeals sitting in Winston-Salem 5 December 1978.

On 1 November 1977, the defendant, Patricia Gail Benson, filed a complaint in Anson County commencing an action against the plaintiff, Robert Clyde Benson, seeking custody of their child, child support and alimony without divorce. The following day, the plaintiff commenced this action in Wilkes County by filing a complaint seeking custody of their child. The plaintiff's complaint and summons in this action brought in Wilkes County were served on the defendant on 4 November 1977. The defendant's complaint and summons in the action previously filed in Anson County were not served on the plaintiff until 16 November 1977. The defendant filed an answer to the plaintiff's complaint substantially denying the allegations of the complaint and alleging that the action commenced in Anson County on 1 November 1977 constituted a prior action for custody, support and alimony. A custody hearing was held in Wilkes County on 13 January 1978. Neither the defendant nor her attorney appeared at that hearing. At the conclusion of that hearing, the trial court entered an order awarding custody of

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the minor child to the plaintiff, Robert Clyde Benson. The defendant appealed.

Porter, Conner & Winslow, by Kurt R. Conner, for plaintiff appellee.

Henry T. Drake for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the trial court's actions in conducting a hearing and awarding custody of the minor child to the plaintiff. In support of this assignment, the defendant contends that her action was commenced in Anson County prior to the commencement of this action and vested exclusive jurisdiction and venue of the child custody proceeding in Anson County. We agree.

No other actions concerning the matters raised in this action were pending at the time the defendant filed her complaint commencing her action against the plaintiff in Anson County. The defendant's complaint in the Anson County action was filed one day prior to the filing of the plaintiff's complaint in this action in Wilkes County. Generally speaking, actions for child custody, child support and alimony follow the same procedures as other civil actions. G.S. 50-13.5(a); G.S. 50-16.8(a). "A civil action is commenced by filing a complaint with the court." G.S. 1A-1, Rule 3. Once an action is commenced, it is pending before the court. "If there is a pending action for annulment, divorce, or alimony without divorce, there cannot be any subsequent action or proceeding instituted for the custody and the support of a minor child of the marriage, it being necessary for a determination of custody and support of the minor child, that the issue be joined in the pending action or by a motion in the cause in such action." 3 Lee, North Carolina Family Law § 222 (1976 Supp.).

The defendant's action in Anson County seeking alimony without divorce, child custody and child support, having been commenced prior to the commencement of this action in Wilkes County, the trial court was without jurisdiction to entertain this independent action by the plaintiff for custody of the minor child. G.S. 50-13.5(f); *Holbrook v. Holbrook*, 38 N.C. App. 303, 247 S.E. 2d 923 (1978). The trial court did not have jurisdiction to consider

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any matter arising from the plaintiff's complaint, and the entire proceeding before the trial court and its order are, therefore, null and void. *Holbrook v. Holbrook*, 38 N.C. App. 303, 247 S.E. 2d 923 (1978); *Hopkins v. Hopkins*, 8 N.C. App. 162, 174 S.E. 2d 103 (1970). The order of the trial court must be and is vacated and the cause remanded.

Vacated and remanded.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. BUD ROPER

No. 7829SC774

(Filed 19 December 1978)

**Assault and Battery § 16.1— assault with deadly weapon—knife as deadly weapon
—instruction on lesser offense not required**

In a prosecution for assault with a deadly weapon, the trial court properly found that a "keen bladed pocketknife" slapped across the victim's throat was a deadly weapon per se and properly failed to charge the jury on the lesser included offense of assault inflicting serious injury.

APPEAL by defendant from *Jackson, Judge*. Judgment entered 18 May 1978 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 5 December 1978.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. Pete Rivera testified that on 26 February 1978, he had been shooting pool, and as he started to leave, "somebody kicked me as I started off the porch and I turned around and said something 'who in hell kicked me,' or something like that and the next thing I knew I felt like a slap on my throat and seen a knife blade go by . . . and I threw my hand up to my throat and blood was coming down to my elbow." At the time he saw the knife, defendant had it. He had had no words with defendant prior to that time and did not even know him.

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Becky Clontz, who was present that evening, testified that she saw defendant slap at Rivera and that when he did, blood flew everywhere. Barbara Bowen testified that she saw the cutting and that there was no one close enough to Rivera to cut him at that time except for defendant. Dr. Bass, who treated Rivera at the hospital, testified that Rivera had an extremely severe injury to his neck, worse than any the doctor had ever encountered. The pharynx and both jugular veins were cut, "and why the man didn't bleed to death, I don't know."

Defendant testified that he was present at the scene but that he did not cut Rivera and did not know who did.

Defendant was found guilty of assault with a deadly weapon inflicting serious injury and sentenced to six to nine years. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Robert L. Harris, for defendant appellant.

ERWIN, Judge.

Defendant's sole assignment of error is that the trial judge failed to charge the jury on the lesser included offense of assault inflicting serious injury. He argues that whether the knife used here was a deadly weapon should have been a jury question. We do not agree.

The description of the knife in this case was given by the victim: "a keen bladed knife or slick bladed knife" and "[defendant] cut me with a pocket knife." The State argues that this is sufficient to require the court to find that the knife was a deadly weapon per se.

Whether a weapon is deadly is generally a decision for the court, *State v. West*, 51 N.C. 505 (1859), and "[a]n instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon." *State v. Joyner*, 295 N.C. 55, 64, 243 S.E. 2d 367, 373 (1978). We believe it is clear that a "keen bladed pocketknife" used under the circumstances here, that is, slapped across the victim's throat, is "likely to produce great bodily harm." "An instru-

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ment . . . may be deadly or not, according to the mode of using it. . . ." *State v. West, supra* at 509. The actual effects produced by the weapon may also be considered in determining whether it is deadly. *State v. West, supra*. Here, the uncontradicted testimony is that the injury was an extremely serious one.

We find that it was the proper function of the trial court to determine that this knife was a deadly weapon per se. As a result, there was no error in the judge's failure to submit the lesser included offense of assault inflicting serious injury. The trial court need not submit a lesser included offense where there is no evidence to support such a verdict. *State v. Black*, 21 N.C. App. 640, 205 S.E. 2d 154, *aff'd*, 286 N.C. 191, 209 S.E. 2d 458 (1974).

No error.

Judges PARKER and HEDRICK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 DECEMBER 1978

HARRIS v. HARRIS No. 7821DC56	Forsyth (77CVD1765)	Affirmed
REDEVELOPMENT COMM. v. COX No. 7825SC43	Burke (75SP517) (75SP667)	Affirmed
STATE v. BOWMAN No. 7821SC614	Forsyth (77CR43018) (77CR43020) (77CR43021) (77CR43022) (77CR43023) (77CR43026)	Affirmed
STATE v. GORE No. 785SC649	New Hanover (77CR16332)	No Error
STATE v. OXENDINE No. 7816SC755	Robeson (77CR3974) (77CR3944) (77CR3943)	No Error
STATE v. RAYNOR No. 789SC543	Granville (76CR5114)	No Error
STATE v. SADLER No. 7821SC548	Forsyth (78CR2143)	New Trial

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BROOKS v. CROUSE No. 7823SC218	Alleghany (76CVS134)	No Error
COX v. INSURANCE CO. No. 7813DC174	Bladen (76CVD0260)	New Trial
HOWELL v. HOWELL No. 7830SC125	Haywood (77SP142)	Affirmed in Part, Reversed in Part and Remanded
IN RE CARPENTER No. 7827DC567	Gaston (78SP128)	Affirmed
STATE v. BARBEE No. 7819SC613	Cabarrus (76CRS9818) (76CRS9819)	No Error
STATE v. BLANTON No. 7827SC707	Lincoln (78CRS280)	No Error
STATE v. BROWN No. 7820SC725	Union (78CR1458)	No Error

STATE v. DOBY No. 7822SC683	Davie (77CR4356)	No Error
STATE v. DYE No. 7822SC577	Davidson (78CRS15699)	No Error
STATE v. JEFFUS No. 7818SC541	Guilford (77CRS29465)	No Error
STATE v. MacEACHERN No. 7827SC362	Gaston (77CRS12136)	No Error
STATE v. McKINNEY No. 7810SC565	Wake (77CRS70429) (77CRS70430)	No Error
STATE v. OWENS No. 7819SC636	Cabarrus (76CRS5161)	No Error
STATE v. RAY No. 7810SC284	Wake (75CRS20691)	No Error
STATE v. SIMPSON No. 7812SC720	Cumberland (77CRS15076)	No Error
STATE v. SMITH No. 7812SC630	Cumberland (77CRS4752)	No Error
STATE v. TEMPLETON No. 7822SC831	Iredell (77CR1323)	Affirmed
TERRY v. KISER No. 7819DC70	Rowan (77CVD297)	Reversed
THIGPEN v. POWELL No. 7824DC178	Avery (77CVM115)	Reversed and Remanded

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RUDOLPH L. EDWARDS, RECEIVER OF DURHAM WHOLESALE CATALOG CO., INC. v. THE NORTHWESTERN BANK; ALPHA BETA CORPORATION; EMPIRE PROPERTIES, INC.; VALCO, INC.; PRESIDENTIAL APARTMENTS, INC.; ROBERT I. LIPTON; ABE GREENBERG; AND C. PAUL ROBERTS

No. 7714SC851

(Filed 2 January 1979)

1. Fiduciaries § 1— misapplication of funds by fiduciary—bank's knowledge or bad faith—summary judgment improper

In an action by a receiver of a corporation to recover assets for the benefit of creditors where defendant bank made a loan of \$400,000 to the corporation for the purpose of financing its inventory, defendant was not entitled to summary judgment on the receiver's claim that defendant permitted the fiduciary of the corporation to divert and misapply over \$250,000 of the loan proceeds with actual knowledge that the fiduciary was committing a breach of his obligation, or with knowledge of such facts that defendant's action in paying certain checks amounted to bad faith, since defendant's general denial of plaintiff's allegations that defendant's officers acted with knowledge of any breach of fiduciary obligation or in bad faith by issuing cashiers checks to the corporation's fiduciary in exchange for a \$250,000 check drawn against the corporation's account was insufficient to carry defendant's burden of establishing with the requisite degree of certainty the nonexistence of any one or more of the essential elements of plaintiff's claim; the peculiar nature of the request by the corporation's fiduciary for four cashiers checks in varying amounts for the purpose of implementing payment by the corporation to a separate corporation in which the fiduciary was the principal of the one sum of \$250,000 was in itself sufficient to raise some question of propriety for consideration by defendant's officer; and the apparent failure of defendant's officer to make inquiry before directing that the four cashiers checks be issued could support a reasonable inference that defendant's officer's passiveness amounted to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. G.S. 32-9.

2. Fiduciaries § 1— bad faith defined

By defining "good faith" in terms of an act done honestly although perhaps negligently, the drafters of the Uniform Fiduciaries Act implicitly revealed their intention that the term "bad faith" requires a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.

3. Fraudulent Conveyances § 3.4— assignment of note and deed of trust

Assignment of a note and deed of trust from a corporation to defendant bank which agreed to forego its rights under a security agreement covering the corporation's inventory did not constitute a fraudulent conveyance, since assignment of the note and deed of trust was involuntary, that is, made for a valuable consideration, and defendant did not know that the corporation was essentially insolvent at the time of the assignment and therefore could not have had notice of the corporation's intent to defraud creditors.

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4. Fraudulent Conveyances § 1— conveyance made with consideration—when fraudulent

When a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors and (2) the grantee either participated in the intent or had notice of it.

5. Assignments for Benefit of Creditors § 1— assignment of note and deed of trust—substantial property retained—no assignment for benefit of creditors

An assignment of a note and deed of trust by a corporation to defendant bank was not an assignment for the benefit of creditors since the corporation at the time of the assignment retained substantial property, including several hundred thousand dollars worth of inventory, and the assignment was therefore not an assignment of practically all of the debtor's property.

6. Assignments for Benefit of Creditors § 2— assignment of note and deed of trust—over four months before general assignment—no unlawful preference

An assignment of a note and deed of trust by a corporation to defendant bank and the transfer of cash did not constitute an unlawful preference, since the assignment and transfer in April of 1974 occurred more than four months preceding a general assignment by the corporation to its receiver in March 1976. G.S. 23-3.

7. Joint Ventures § 1— elements

Two factual elements are essential to a finding that a joint venture exists: (1) an agreement, express or implied, to carry out a single business venture with joint sharing of profits, and (2) an equal right of control of the means employed to carry out the venture.

8. Joint Ventures § 1— financing institution—liquidating corporation—no joint venturers

Defendant bank was entitled to summary judgment on plaintiff's claim that defendant became a joint venturer in the liquidation of the assets of a corporation and thereafter breached its fiduciary responsibility as such joint venturer where the evidence tended to show the execution of an inventory control agreement by means of which defendant received regular reports on the corporation's inventory, the reception by defendant of regular reports on the corporation's accounts payable activity, the exercise of a substantial degree of control over checks drawn against the corporation's checking account, and one visit by an officer of defendant to the corporation's premises to inspect its inventory, but there was no evidence of an agreement to carry out a single business venture with a joint sharing of profits and no evidence that defendant exercised an equal degree of control over the means employed by the corporation to carry out the venture.

9. Fiduciaries § 2— financing institution—fiduciary obligation—insufficiency of evidence

To justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor; evidence in this case consisting of an inven-

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tory control agreement, defendant's scrutiny of checks drawn against the corporation's account, and one visit of an officer of defendant to check on the corporation's inventory did not amount to control, domination and spoilation of the corporation's affairs.

APPEAL by the Receiver from *McKinnon, Judge*. Judgment entered 18 May 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 August 1978.

This appeal involves only the Receiver and the defendant The Northwestern Bank. The judgment appealed from was a summary judgment in favor of The Northwestern Bank holding that there is no genuine issue as to any material fact as to The Northwestern Bank and that it is entitled to judgment as a matter of law.

The Durham Wholesale Catalog Co., Inc. was organized in October 1973. It incurred considerable indebtedness for inventory and in April 1974 began a liquidation of all assets. Apparently substantial indebtedness by Durham Wholesale Catalog Co., Inc. remained and the Receiver was appointed, presumably at the instance of one or more creditors.

This action was instituted by the Receiver in May 1976 against The Northwestern Bank, as well as against several additional corporations and individuals, to recover assets for the benefit of creditors of Durham Wholesale Catalog Co., Inc. (Durham Wholesale). Generally the Receiver alleges conversion and misapplication of Durham Wholesale's assets and properties, fraudulent conveyances, voidable preferences, assignment for the benefit of creditors, a joint venture, and breach of fiduciary duty by The Northwestern Bank.

Randall, Yaeger & Woodson, by John C. Randall, for the Receiver.

Jordan, Wright, Nichols, Caffrey & Hill, by Edward L. Murrelle and Robert D. Albergotti, for The Northwestern Bank.

BROCK, Chief Judge.

In his appeal from the summary judgment in favor of The Northwestern Bank (Bank) the Receiver argues three propositions:

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1. That the Bank failed to show that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law with respect to the Receiver's assertion that the Bank permitted the fiduciary of Durham Wholesale to divert and misapply \$250,000.00 of corporate funds with actual knowledge that the fiduciary was committing a breach of his obligation, or with knowledge of such facts that the Bank's action in paying the check amounted to bad faith. *See* G.S. 32-9.

2. That the Bank failed to show that there was no genuine issue as to any material fact and that the Bank was entitled to judgment as a matter of law with respect to the Receiver's assertion that the Bank's acceptance of an assignment of a note and deed of trust from Durham Wholesale and the transfer to the Bank of \$50,813.00 by Durham Wholesale constituted either an unlawful preference, a fraudulent conveyance, or an assignment for the benefit of creditors.

3. That the Bank failed to show that there was no genuine issue as to any material fact and that the Bank was entitled to judgment as a matter of law with respect to the Receiver's assertion that the Bank became a joint venturer in the liquidation of the assets of Durham Wholesale and thereafter breached its fiduciary responsibility as such joint venturer, or alternatively that the Bank breached its fiduciary obligation arising from its control and domination of Durham Wholesale's affairs.

For the reasons hereinafter stated we affirm the trial court's grant of summary judgment with respect to the second and third propositions. We reverse the trial court's grant of summary judgment with respect to the first proposition and remand for trial upon the issues raised thereby.

[1] 1. Did the Bank show that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law with respect to the Receiver's assertion that it permitted the fiduciary of Durham Wholesale to divert and misapply \$250,813.00 of corporate funds with actual knowledge that the fiduciary was committing a breach of his obligation, or with knowledge of such facts that the Bank's action in paying the check amounted to bad faith? We answer in the negative and hold that the trial court committed error in granting summary judgment for the Bank upon this question.

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According to the record on appeal before us the following was shown by the Receiver: On 9 October 1973 the organizational meeting of Durham Wholesale was held, at which time A. Greenberg was elected President and Chairman of the Board, and C. Paul Roberts was elected Vice-President. On that day 500 shares of stock were issued at \$1.00 per share: 250 shares to A. Greenberg and 250 shares to C. Paul Roberts. A Pro-Forma Balance Sheet statement dated 31 October 1973 signed by Greenberg and Roberts, showing accounts payable for inventory in the sum of \$615,000.00, was submitted to defendant Bank by Greenberg and Roberts. On 1 November 1973 a Certified Inventory Control Agreement was entered into between Durham Wholesale, defendant Bank, and Lawrence Systems, Inc. On 2 November 1973 the Board of Durham Wholesale authorized Greenberg to borrow \$500,000.00 from defendant Bank and execute a security agreement. Both Greenberg and Roberts were active in negotiating the loan through Atkinson, City Executive of defendant Bank's Durham Branch. On 5 November 1973 Greenberg and Roberts agreed to maintain a compensating balance of \$100,000.00 in either individual or corporate balances. Greenberg was known by Atkinson, of defendant Bank, to be the principal of Valco, Inc., which maintained an account with defendant Bank, and Roberts was known by Atkinson, of defendant Bank, to be the principal of Empire Properties, Inc., which maintained an account with defendant Bank. Greenberg, Roberts, and their families were known by Atkinson, of defendant Bank, to be involved in multifarious corporate operations in Durham County. By letter dated 6 November 1973 the Certified Public Accountant for Durham Wholesale wrote a letter stating that the value of inventory in the warehouse was in excess of \$600,000.00; this letter was delivered to defendant Bank. On or about 6 November 1973 a Security Agreement-Floating Lien on Inventory-Variable Interest Rate agreement for a \$500,000.00 line of credit to finance inventory was executed by Durham Wholesale and delivered to defendant Bank; Greenberg and Roberts signed as personal guarantors. On 6 November 1973 a Financing Statement was filed showing Durham Wholesale as the debtor and defendant Bank as creditor covering "all inventory and all inventory hereafter acquired and all additions and accessions thereto, and all proceeds of its sale or disposition." On 6 November 1973, \$400,000.00 was advanced by defendant Bank to Durham Wholesale upon its note for \$400,-

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000.00 issued on the \$500,000.00 line of credit. On 6 November 1973 Greenberg executed a Durham Wholesale check to Empire Properties in the sum of \$250,000.00. On 7 November 1973, upon instructions from Atkinson, of defendant Bank, the commercial loan teller of defendant Bank issued four cashier's checks made payable to Empire Properties in exchange for the Durham Wholesale check made payable to Empire Properties. The four cashier's checks were dated 7 November 1973 and were made payable in the following sums: \$50,000.00, \$60,000.00, \$40,000.00, and \$100,000.00. The \$50,000.00 check was endorsed Empire Properties by Roberts and negotiated to one James W. Tyndall who in turn negotiated it to defendant Bank. The \$60,000.00 check was endorsed Empire Properties by Roberts and negotiated to defendant Bank. The \$40,000.00 check was endorsed Empire Properties by Roberts and negotiated to Liberty Bank & Trust Co., Durham, by Roberts for cash. The \$100,000.00 check was endorsed Empire Properties by Roberts, negotiated to Valco, Inc., endorsed Valco, Inc., by Greenberg, and negotiated to defendant Bank. From the present record it appears that \$250,000.00 of the \$400,000.00 loan to finance inventory may have been immediately applied to uses other than that for which it was intended, and the general creditors of Durham Wholesale were faced with a \$400,000.00 lien on Durham Wholesale's inventory without corresponding assets in Durham Wholesale with which to pay general creditors. It also appears from the present record that Empire Properties was a corporation dealing in real estate and not in inventory supplies.

In its motion for summary judgment defendant Bank stated it was relying upon "the deposition of the plaintiff heretofore taken on October 15, 1976, and upon the affidavit of Fenton S. Cunningham submitted herewith." The deposition of the plaintiff taken on October 15, 1976, is not included in the record on appeal. We, therefore, conclude that it was of no value in establishing defendant Bank's claim to summary judgment. The affidavit of Cunningham, a Vice-President of defendant Bank, constitutes no more than a general denial of knowledge on the part of defendant Bank of any improper use of the proceeds of the \$400,000.00 loan which was made to Durham Wholesale for the purpose of financing its inventory.

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Although the issues discussed under this first proposition presented on appeal are not clearly alleged in the complaint, it appears that the parties addressed it both on the motion for summary judgment and on this appeal without objection. We will therefore assume for purposes of this appeal that the complaint has been amended by consent to allege the issues discussed hereunder.

North Carolina General Statutes, Section 32-9 provides:

"If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, *unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith.* If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check." (Emphasis added.)

Under the provisions of this statute the defendant Bank would be liable to the principal (Durham Wholesale) if the defendant Bank paid the 6 November 1973 check for \$250,000.00 drawn on the principal's account by Greenberg, the fiduciary, with actual knowledge that the fiduciary was committing a breach of his obligation as fiduciary in drawing such check for a purpose other than to finance the principal's inventory, or if defendant Bank paid said check with knowledge of such facts about the payee or the purpose of the check that its action in paying the check amounted to bad faith. Under the provisions of G.S. 32-9 the existence of actual knowledge, or the existence of knowledge of such facts that its action in paying the check amount to bad faith, or both, would render defendant Bank liable to the principal (Durham Wholesale). The plaintiff Receiver in this case stands in the place of the principal.

[2] Determining whether or not a bank acted with "actual knowledge" that a fiduciary was committing a breach of his obligation presents little difficulty. But determining whether an act was

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done "in bad faith" as plaintiff here contends poses a more difficult question. Nowhere in the Uniform Fiduciaries Act, of which G.S. 32-9 is a part, is the term bad faith defined. G.S. 32-2(b) does, however, provide that "[a] thing is done 'in good faith' within the meaning of this Article when it is in fact done honestly, whether it be done negligently or not." A showing of mere negligence is clearly not sufficient to establish liability. It is also worth noting in attempting to define the bad faith standard that the very purpose of the Uniform Fiduciaries Act was to relax the common law standard of care owed by banks to principals when dealing with their fiduciaries. 7A Uniform Laws Annotated 128 (West 1978). By defining "good faith" in terms of an act done honestly although perhaps negligently, we think the drafters of the Act implicitly revealed their intention that the term "bad faith" requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances "... so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction." *General Ins. Co. of America v. Commerce Bank of St. Charles*, 505 S.W. 2d 454, 458 (1974). In *Davis v. Pennsylvania Co. for Ins. on Lives and Granting Annuities*, 337 Pa. 456, 460, 12 A. 2d 66, 69 (1940), the court in considering another section of the Uniform Fiduciaries Act imposing the same standard of liability set forth in G.S. 32-9 discussed the distinction between negligence and bad faith as follows:

"At what point does negligence cease and bad faith begin? The distinction between them is that bad faith, or dishonesty, is, unlike negligence, wilful. The mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith (*Union Bank & Trust Co. v. Girard Trust Co.*, 307 Pa. 488, 500, 501, 161 A. 865), unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction,—that is to say, where there is an intentional closing of the eyes or stopping of the ears."

We think this distinction strikes the proper balance with respect to the liability of a bank for a fiduciary's breach of his obligation.

By the evidence he produces in support of his motion, a defendant moving for summary judgment must first establish

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that there is no genuine issue as to any material fact and second that he is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). It is on this initial burden borne by the defendant-movant that we focus our analysis. Although there is not complete agreement on the weight of this initial burden, *see* Louis, M. *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974), we have held that a defendant-movant must produce evidence of the necessary certitude which negatives any one or more of the essential elements of plaintiff's claim. *Tolbert v. Great Atlantic Pacific Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). Until the movant meets this initial burden, the opposing party, even though he may bear the burden of proof at trial, need not respond with evidence showing further support for his claim and a grant of summary judgment in defendant's favor is improper. The defendant-movant has a particularly difficult burden to carry in a case, such as this one, in which the plaintiff's claim is dependent on proof that the defendant acted with a particular state of mind, *e.g.*, cases involving fraud, conspiracy, or bad faith. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); 6 *Moore's Federal Practice*, pt. 2, §56.17 [41.-1], p. 930 (1976). In such a case defendant-movant, in order to meet his initial burden on a motion for summary judgment, must at least produce more than a mere denial by affidavits that he acted with the state of mind alleged by plaintiff. His evidence in support of his motion must again be of the necessary certitude as to negative any one or more of the essential elements of plaintiff's claim.

[1] In this instance defendant Bank stated in its motion for summary judgment that it was relying on the affidavit of one of its officers, Fenton S. Cunningham. Cunningham's affidavit, as we have noted earlier, amounted to no more than a general denial of plaintiff's allegations that defendant Bank's officers acted with knowledge of any breach of fiduciary obligation or in bad faith by issuing the cashiers checks to Greenberg in exchange for the \$250,000.00 check drawn against Durham Wholesale's account. The peculiar nature of the request by Greenberg (of Durham Wholesale) for four cashier's checks in varying amounts for the purpose of implementing payment by Durham Wholesale to Empire Properties of the one sum of \$250,000.00 was in itself sufficient to raise some question of propriety for consideration by Atkinson (of defendant Bank). His (Atkinson's) apparent failure to

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make inquiry before directing that the four cashier's checks be issued could support a reasonable inference that his (Atkinson's) passiveness amounted to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. We think a mere general denial of plaintiff's allegations, particularly in a case such as this one in which state of mind is the essential element, fails to carry the defendant-movant's initial burden of establishing with the requisite degree of certainty the nonexistence of any one or more of the essential elements of plaintiff's claim. The grant of summary judgment in favor of defendant Bank on the issue of its liability for the breach of fiduciary obligation by the officers of Durham Wholesale was, therefore, improper.

[3] 2. Did the Bank show that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law with respect to the Receiver's assertion that the Bank's acceptance of an assignment of a note and deed of trust from Durham Wholesale and the transfer to the Bank of \$50,813.00 by Durham Wholesale constituted either a fraudulent conveyance, an unlawful preference or an assignment for the benefit of creditors?

According to the record on appeal the following was shown by the Receiver with respect to this allegation: On 29 March 1974 Durham Wholesale transferred the title to its land and building to Alpha Beta Corporation, which at the time of the transfer owned all of the shares of Durham Wholesale, and in which A. Greenberg served as an officer. On 19 April 1974 Alpha Beta Corporation gave to Durham Wholesale a note and purchase money deed of trust in the amount of \$151,778.00 in payment for the transferred property. On 19 April 1974 the Bank was informed by the officers of Durham Wholesale that they had decided to liquidate the company's inventory because they felt they were not familiar enough with the catalog business to compete effectively. The security agreement covering the inventory of Durham Wholesale authorized the Bank in such an event to declare the \$400,000.00 note immediately payable and to pursue its rights under the Uniform Commercial Code, including the right to repossess the inventory collateral. Upon being advised that the proceeds from the liquidation sale would be deposited in Durham Wholesale's checking account and applied to the satisfaction of claims of general creditors and the \$400,000.00 indebtedness to the Bank, the Bank agreed to

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forego its rights under the security agreement and rely on the proceeds of the liquidation sale for satisfaction of Durham Wholesale's debt. As a condition to its relinquishment of those rights, however, the Bank made three demands: that Durham Wholesale assign to it the note and deed of trust given to Durham Wholesale by Alpha Beta Corporation; that it be allowed to debit Durham Wholesale's account in the amount of \$50,813.00 to be applied to reduction of the \$400,000.00 indebtedness; and that Greenberg, Roberts and their wives give personal guarantees on the balance of the loan. Durham Wholesale's officers complied with these demands and then proceeded to liquidate the inventory, from the proceeds of which substantial payments were made both to general creditors of Durham Wholesale and to the Bank.

General Statute Number 39-15 provides for the setting aside of fraudulent conveyances made by a debtor. In *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), the court observed that a distinction must be drawn between voluntary conveyances (those not made for a valuable consideration) and involuntary conveyances (those made for a valuable consideration). An involuntary conveyance is void only when it is "... made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he had notice. . . ." *Id.* at 227-28, 81 S.E. at 164.

The Bank contends, and we agree, that the assignment of the note and deed of trust by Durham Wholesale was involuntary. Valuable consideration is deemed to have been given by the transferee when he suffers a legal detriment and the transferor receives a corresponding benefit. 37 C.J.S., *Fraudulent Conveyances*, § 140, p. 964. It is an uncontroverted fact that the Bank relinquished its right to declare Durham Wholesale in default and resort to repossession of the inventory collateral. The corresponding benefit which inured to Durham Wholesale was the right to liquidate its inventory and, by doing so, to pay off its other creditors as well as the Bank. Furthermore, a deed of trust or a mortgage made to secure an existing debt is a conveyance for a valuable consideration. *Fowle v. McLean*, 168 N.C. 537, 84 S.E. 852 (1915); *Potts v. Blackwell*, 56 N.C. 449 (1857). The same principle would apply when the debtor assigns as security for an existing debt a note and deed of trust which he holds. That the existing debt was already amply secured may in some instances

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result in a finding that the assignment or transfer was fraudulent is true. 37 C.J.S., *Fraudulent Conveyances*, § 155(d), p. 979. But so long as the debtor is not insolvent, and the property conveyed or assigned is not worth materially more than the debt, the creditor may take further security, particularly where the transfer is accompanied by a release of rights formerly held in other security. *Citizens Bank of Pleasant Hill v. Robinson*, 342 Mo. 697, 117 S.W. 2d 263 (1937). Given the Bank's agreement to relinquish its rights with respect to the inventory collateral, we think it was entitled to demand other security for Durham Wholesale's debt and should be deemed to have given valuable consideration for the assignment.

[4] According to *Aman* when a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors, and (2) the grantee either participated in the intent or had notice of it. The record is devoid of any evidence of Durham Wholesale's actual intent to defraud its creditors by transferring the note and deed of trust. Intent to defraud creditors may be presumed, however, when the debtor does not retain property sufficient to pay his then-existing debts. See *Everett v. Carolina Mortgage Co.*, 214 N.C. 778, 1 S.E. 2d 109 (1938); *Cheatham v. Hawkins*, 80 N.C. 161 (1879); *Stone v. Marshall*, 52 N.C. 300 (1859). The Receiver contended the Bank had notice of Durham Wholesale's intent to defraud creditors because it knew Durham Wholesale was essentially insolvent at the time of the assignment. In support of this contention, he relied on documentary evidence, which arguably tends to show Durham Wholesale was insolvent at the time of the assignment. The principal piece of documentary evidence was a balance sheet for Durham Wholesale prepared by a public accounting firm, which showed as an asset a \$290,000.00 advance to affiliates. The Receiver contends this asset actually represented sums diverted to their other corporate ventures by the officers of Durham Wholesale and that the Bank had knowledge of that fact. The Bank's uncontroverted evidence, however, shows that the balance sheet did not come into its possession until June 1974 and that prior to the assignment of the note and deed of trust the Bank had been given oral assurances of Durham Wholesale's solvency by the accounting firm. The Receiver also relied on a Dun and Bradstreet Report dated 4

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March 1974, which was in the Bank's files. There is nothing in that report, however, which would have put the Bank on notice as to Durham Wholesale's financial instability. Defendant contends that other facts and circumstances known to the Bank should have put it on notice, *e.g.*, Durham Wholesale's slowness in paying its creditors, the officer's decision to liquidate the inventory, and Durham Wholesale's failure to pay any principal or interest on its loan from the Bank until more than four months after the loan was made. In the light of the other indications of financial stability of Durham Wholesale that the Bank had, these facts were not such as to justify charging the Bank with notice of Durham Wholesale's insolvency. The Bank's evidence in support of its motion for summary judgment clearly establishes it neither participated in any fraudulent intent or had notice of it. The Receiver failed to respond with any further evidence showing either participation or knowledge and the grant of summary judgment in favor of the Bank on the fraudulent conveyance issue was, therefore, proper.

Alternatively, the Receiver contended the assignment of the note and deed of trust and the transfer of the \$50,813.00 should be deemed to be an assignment for the benefit of creditors and a voidable preference. It has been held pursuant to G.S. 23-1 that when an insolvent person makes an assignment of practically all his property to secure an existing debt, there being also other creditors, the transaction will be treated as if it were an assignment for the benefit of creditors and subject to the statutes relating thereto. *Odom v. Clark*, 146 N.C. 544, 60 S.E. 513 (1908); *National Bank of Greensboro v. Gilmer*, 116 N.C. 684, 22 S.E. 2 (1895). A voidable preference is the transfer or conveyance of property by a debtor "... within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a pre-existing debt, when the grantee or transferee knows or has reasonable grounds to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer." G.S. 23-3. The statute has been held to encompass assignments as security for a pre-existing debt as well as absolute transfers. *Teague v. Howard Grocery Co.*, 175 N.C. 195, 95 S.E. 173 (1918).

[5] We think the uncontroverted facts support the grant of summary judgment in the Bank's favor on both of these contentions.

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Durham Wholesale retained substantial property, including several hundred thousand dollars worth of inventory, which it liquidated and applied a substantial part of the resulting proceeds to the payment of general creditors and the Bank; the assignment was not, therefore, an assignment of practically all of the debtor's property. Since the evidence negatives the existence of this essential element of the Receiver's claim that the assignment of the note and deed of trust was in effect an assignment for the benefit of creditors, the grant of summary judgment for the Bank on this issue was proper.

[6] There does appear to be a factual controversy with respect to Durham Wholesale's solvency at the time of the assignment and transfer of cash; nonetheless, we think summary judgment in favor of the Bank on the Receiver's voidable preference claim was properly allowed. To constitute a preference, a conveyance or assignment for security must have been made within four months next preceeding the registration of a general assignment by the debtor. Having decided that the assignment of the note itself was not an assignment for the benefit of creditors, the only date at which such an assignment conceivably took place was in March 1976 when the Receiver was appointed. The assignment of the note and deed of trust and transfer of cash having been effected in April 1974, they clearly were not made within the proscribed time period of four months. Moreover, the Bank's evidence, as we discussed *supra*, negates the Receiver's contentions that the Bank had notice of Durham Wholesale's insolvency or reasonable grounds to believe the company was not solvent at the time the note and deed of trust were assigned and the debit of Durham Wholesale's account was authorized.

3. Did the Bank fail to show that there was no genuine issue as to any material fact and that the Bank was entitled to judgment as a matter of law with respect to the Receiver's assertion that the Bank became a joint venturer in the liquidation of the assets of Durham Wholesale Catalog Co., Inc. and thereafter breached its fiduciary responsibility as such joint venturer, or alternatively, that the Bank breached its fiduciary duty arising from its control and domination of Durham Wholesale's affairs?

[8] The record on appeal reveals the following evidence was submitted by the Receiver in support of this contention: On 1 Novem-

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ber 1973, Durham Wholesale, the Bank, and Lawrence Systems, Inc. entered into a three party Inventory Control Agreement, by means of which the Bank received regular reports on Durham Wholesale's inventory. On 19 April 1974, the officers of Durham Wholesale notified the Bank of their intention to liquidate the firm's inventory. An agreement was executed jointly by the Bank and Durham Wholesale, releasing Lawrence Systems from its inventory control obligations. During the period of liquidation, the Bank received regular reports on Durham Wholesale's accounts payable activity and exercised a substantial degree of control over checks drawn against Durham Wholesale's checking account. During the same period, the Bank also received estimated weekly expense budgets for Durham Wholesale, and an officer of the Bank made one visit to Durham Wholesale's premises to inspect its inventory.

A joint venture is defined in 46 Am. Jur. 2d, Joint Ventures, § 1, pp. 21-22 as:

"... an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit . . . with an equal right of control of the means employed to carry out the common purpose of the venture."

In *James v. Atlantic and East Carolina RR Co.*, 233 N.C. 591, 65 S.E. 2d 214 (1951), the Court held that whether a joint venture exists has to be determined from the facts of each particular case. Applying that rule in *Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968), the court held that on the facts of that case a joint venture did not exist. The court reached its conclusion on grounds that, "... each could not direct the conduct of the others" and because there was not "... an undertaking attended with risk by which defendants jointly sought a profit." *Id.* at 10, 161 S.E. 2d at 461.

[7] Analysis of both general and North Carolina law reveals that two factual elements are essential to a finding that a joint venture exists. There must be (1) an agreement, express or implied, to carry out a single business venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture.

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[8] Taking all of the Receiver's factual allegations as true, including his assertion that subsequent to the decision to liquidate the Bank exercised the right of prior approval on all checks drawn on Durham Wholesale's account, we think the Bank was entitled to judgment as a matter of law on this issue. The evidence fails to show there was an agreement, express or implied, to carry out a single business venture with a joint sharing of profits. No evidence was presented to show that the Bank was entitled to or received anything more than repayment of the sums loaned and the normal rate of interest.

The Receiver contends the factual situation presented is similar to *In re Simpson*, 222 F. Supp. 904 (M.D.N.C. 1963), in which a homebuilder and a mortgage company were held to be joint venturers. Whether a lender becomes a joint venturer with its debtor is, however, a question that must be determined on the particular facts of each case. In 46 Am. Jur. 2d, Joint Ventures, § 25, p. 46, it is stated:

"Although one party's contribution to a joint venture may be to provide the funds necessary to finance it, an agreement to finance a scheme or operation does not necessarily constitute the lender a joint venturer with the borrower; and this is true, even though the profits resulting from the venture are to be divided between the operator and the person advancing the money, where the lender has no control or interest in the scheme itself beyond such right to a share of the profits."

In this respect, the evidence fails to show the Bank exercised an equal degree of control over the means employed by Durham Wholesale to carry out the venture. Although the Bank relinquished its right to repossess the inventory collateral, it nonetheless retained a security interest in the inventory and its proceeds. The control exercised by the Bank that the Receiver contends made the Bank a joint venturer with Durham Wholesale was a normal incident of the Bank's efforts to protect its security interest. It certainly did not amount to equal control of the means employed to carry out the venture.

Moreover, we note that G.S. 25-9-317 provides: "The mere existence of a security interest or authority given to the debtor to dispose of or to use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or

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omissions." To hold on these facts that a secured lender became a joint venturer with its debtor would seriously disrupt the carefully constructed system of secured financing.

[9] On the basis of the same evidence he presented to support his contention that the Bank and Durham Wholesale were joint venturers, the Receiver contended a fiduciary duty on the part of the Bank arose by virtue of the Bank's exercise of control over Durham Wholesale's affairs. In support of this contention he relies on *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939). In *Taylor* the Court held that a parent corporation that had completely dominated the affairs of its subsidiary owed a fiduciary duty to the shareholders of the subsidiary. The concept of fiduciary obligation arising from outside control of the affairs of a corporation has been extended to include control of a corporation's affairs by a financing party. *In re Process-Manz Press, Inc.*, 236 F. Supp. 333 (N.D. Ill. 1964), *rev'd on other grounds*, 369 F. 2d 513 (7th Cir. 1966), *cert. denied*, 386 U.S. 957, 87 S.Ct. 1022, 18 L.Ed. 2d 104 (1967). In that case the claims of a corporation's financier were subordinated to the claims of general creditors based on a finding that the evidence clearly established the financier's *domination* of the affairs of the debtor corporation.

From our study of the cases the Receiver relies on in support of this contention, it is clear that the fiduciary duty arises only when the evidence establishes that the party providing financing to a corporation completely dominates and controls its affairs. We do not find any evidence in the record before us that would justify the imposition of such a fiduciary obligation on the Bank. The evidence the Receiver relied upon in support of this contention, *i.e.*, the Inventory Control Agreement, the Bank's scrutiny of checks drawn against Durham Wholesale's account, and the one visit of an officer of the Bank to check on Durham Wholesale's inventory, simply does not amount to control, domination and spoilation of Durham Wholesale's affairs. To justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor. *In re Prima Co.*, 98 F. 2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658, 59 S.Ct. 357, 83 L.Ed. 426 (1939). For the foregoing reasons, the grant of summary judgment

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in the Bank's favor on the joint venture claim and the allegations of breach of fiduciary obligation is affirmed.

The judgment of the court below granting the Bank's motion for summary judgment is reversed with respect to the Receiver's assertion that the Bank committed a breach of its obligation by permitting the officers of Durham Wholesale to divert and misapply \$250,000.00 of corporate funds; the judgment is otherwise affirmed.

Affirmed in part; reversed in part; and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. NATHANIEL PHIFER

No. 7826SC592

(Filed 2 January 1979)

1. Searches and Seizures § 11— inventory of contents of impounded vehicle—State's burden of proof

In order for an inventory of the contents of a vehicle being impounded after the arrest of the driver not to violate the Fourth Amendment proscription against unreasonable searches and seizures, the State must show that the automobile was lawfully impounded, there being a demonstrable need for its impoundment; that the driver was not arrested as a subterfuge for searching the vehicle; that the inventory was reasonably related to its purpose, which is the protection of the owner from loss and the police or other custodian from unjust claims; that the inventory itself was reasonable and not exploratory in character; and that the inventory was actually conducted under circumstances indicative of a true protective examination of the contents of the vehicle.

2. Searches and Seizures § 11— inventory of contents of impounded vehicle—discovery of cocaine—lawfulness

An inventory of the contents of defendant's car after his arrest pursuant to an outstanding warrant for a traffic violation, during which cocaine was discovered in the locked glove compartment, did not constitute an unreasonable search where defendant was lawfully arrested; the arresting officer determined that it would be unsafe to leave defendant's car at that particular location because of the probability of vandalism and directed his fellow officer to begin a "vehicle inventory form" on the car in accordance with requirements of the city code; the arresting officer then began a search of defendant and discovered a large sum of money on his person; defendant took a key from his shoe and attempted to throw it away, but the officer took the

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key from defendant; an officer used the key to open the glove compartment and found a plastic bag containing a white powdery substance; and when the substance was discovered, the inventory was stopped, one officer followed the car to the police garage and the other officer obtained a warrant so that the remainder of the car could be searched.

Judge ARNOLD dissenting.

APPEAL by defendant from *Smith (David)*, Judge. Judgment entered 28 February 1978, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 October 1978.

Defendant was indicted for felonious possession of cocaine and, upon call of the case for trial, moved to suppress the evidence obtained from the glove compartment of his automobile. The motion, after hearing, was denied by the court, and defendant entered a plea of guilty. Upon his plea, judgment of five years imprisonment was entered. From entry of the judgment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Marilyn R. Rich, for the State.

Plumides, Plumides and Shuster, by John G. Plumides, for defendant appellant.

MORRIS, Chief Judge.

Although defendant grouped eight assignments of error in the Record, only one is brought forward and argued in his brief. It is addressed to the court's denying defendant's motion to suppress the evidence which the arresting officers found in the locked glove compartment of defendant's car while conducting an inventory of the contents of the car.

After a hearing on the motion to suppress, the court made findings of fact and concluded that the motion should be denied and the evidence obtained during the inventory procedure would be admissible in evidence. The defendant properly does not contend that the court's findings are not supported by the evidence. They are indeed supported by the evidence, and are as follows:

"... [T]he Court after hearing evidence of both the State and the Defendant and argument of counsel for both parties makes the following findings of fact: That on the 17th day of

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November, 1977, Defendant, Nathaniel Phifer, was operating a 1972, black, Lincoln automobile in the City of Charlotte, that on the 17th day of November, 1977, at about the same time Officer W. F. Christmas of the Charlotte Police Department was on duty and working radar in the City of Charlotte; that Officer Christmas, through his radar equipment, clocked the Defendant driving his 1972 Lincoln automobile at 48 miles per hour in a 35 miles per hour speed zone; that Officer Christmas immediately pursued Defendant's automobile and was able to bring Defendant to a stop; that Defendant was advised that he was speeding 48 miles per hour in a 35 mile per hour zone and was advised that he would receive a citation for said violation; that Officer T. G. Barnes of the Charlotte Police Department was on duty on this date and operating a police vehicle in the City of Charlotte; that Officer T. G. Barnes arrived at the scene shortly after the Defendant was stopped by Officer Christmas and Officer Barnes informed Officer Christmas that he knew the Defendant; that Officer Christmas and Officer Barnes were informed through the Charlotte Police Department radio network that a warrant was outstanding for a traffic violation on Defendant; that Defendant was placed under arrest; that Officer Christmas frisked Defendant Phifer and found One Thousand Ninety-Nine Dollars in cash on his person; that Defendant then took a key from his shoe and tried to throw said key away, but was stopped by Officer Christmas who forceably took the key away from the Defendant; that Officer Christmas believed the key to be a glove compartment key for the 1972 Lincoln automobile;

That Officer Barnes pursuant to Charlotte Police Department policy which was effective February 26, 1976, and entitled Vehicle Towing and Inventory Procedure, pursuant to Charlotte Code, Section 20-11 and 20-20, commenced an inventory of the 1972, black Lincoln automobile; that Officer Barnes found five to eight . . . five eight-track tapes, a lady's coat, pair of blue jeans, a rust-colored sweater and a camera, which were in plain view inside the automobile; that Officer Barnes then took the key from Officer Christmas and opened the locked glove compartment of the 1972 Lincoln automobile and found a plastic bag containing a white powdery sub-

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stance at which time Officer Barnes ceased his inventory and informed Officer Christmas that a search warrant was . . . that a search warrant should be obtained; that Officer Christmas did, in fact, obtain a search warrant on the 17th day of November, 1977, at 9:53 o'clock P.M., and a search pursuant to said warrant of a 1972, Lincoln automobile and, more specifically, the trunk thereof; produced a set of scales and residue of a white, powdery substance; that the 1972, Lincoln automobile was towed to the Charlotte Police Department garage immediately after Officer Barnes ceased his inventory upon finding a white, powdery substance or a powder containing a white powdery substance in the glove compartment of said automobile, and prior to obtaining the search warrant as mentioned above;

That Officer Barnes knew the defendant prior to this incident and knew Defendant to be a suspected drug dealer. . . ."

Defendant contends that the procedures employed by the police officers in inventorying the contents of his automobile constituted an illegal search and that the evidence obtained was, therefore, inadmissible. We disagree.

In *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed. 2d 1000 (1976), the Court held that a police inventory which followed standard police procedures, was not unreasonable under the Fourth Amendment. Defendant's car was towed to the city impound lot because of multiple parking violations. The car was locked when towed away and impounded but, at the direction of a police officer, was unlocked after it was impounded. Pursuant to standard police procedures and using a standard inventory form, the officer inventoried the contents of the car, including the contents of the glove compartment, which was not locked. There he found a plastic bag containing marijuana. Defendant was arrested on charges of possession of marijuana, moved to suppress the evidence which the inventory had yielded, the motion was denied, and he was convicted. The Supreme Court of South Dakota reversed the conviction, holding that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. The Supreme Court of the United States granted certiorari and reversed. In so doing the majority said the standard procedure was not a pretext conceal-

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ing an investigatory police motive, and the inventory was not unreasonable in scope. The Court noted that, in relation to the Fourth Amendment, it had traditionally drawn a distinction between automobiles and homes and recognized that one's "expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.*, 428 U.S. at 367, 96 S.Ct. at 3096, 49 L.Ed. 2d at 1004. This is true because the function of the automobile is transportation. Rarely does it serve as one's residence or as the place where one keeps personal effects. For a variety of reasons, police frequently find it necessary and desirable to impound a vehicle. When this is done, most police departments follow a routine procedure of securing the automobile and inventorying its contents.

"These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States v. Mitchell*, 458 F2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, *United States v. Kelehar*, 470 F2d 176, 178 (CA5 1972); and the protection of the police from potential danger, *Cooper v. California*, *supra*, at 61-62, 17 L Ed 2d 730, 87 S Ct 788. The practice has been viewed as essential to respond to incidents of theft or vandalism. See *Cabbler v. Commonwealth*, 212 Va 520, 522, 184 SE2d 781, 782 (1971), cert denied, 405 US 1073, 31 L Ed 2d 807, 92 S Ct 1501 (1972); *Warrix v. State*, 50 Wis 2d 368, 376, 184 NW2d 189, 194 (1971)." *Id.*, 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed. 2d at 1005.

The Court noted that the inventory procedure has been upheld by the great majority of State courts as constitutionally permissible, even where the inventory was characterized as a search, and that "the majority of the Federal Courts of Appeal have likewise sustained inventory procedure as reasonable police intrusion." The Court further observed that "these cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration . . . as well as a place for the temporary storage of valuables." *Id.*, 428 U.S. at 372, 96 S.Ct. at 3098, 49 L.Ed 2d at 1007. The Court then adopted the same conclusion: that inventories pursuant to standard police procedures are reasonable, and on the record before it, there was no

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evidence that the inventory was other than standard police procedure prevailing throughout the country and "approved by the overwhelming majority of the courts." *Id.*, 428 U.S. at 376, 96 S.Ct. at 3100, 49 L.Ed. 2d at 1009.

While each case must stand on its own facts, a brief review of selected cases results in the conclusion that although the inventory "search" is a unique concept in law and cannot be "analyzed through the use of traditional constitutional tools", 48 Chicago—Kent Law Rev. 48, 52 (1971), certain principles emerge which should be devices for measuring the reasonableness of the procedure in a particular case.

In *People v. Andrews*, 6 Cal. App. 3d 428, 85 Cal. Rptr. 908 (1970), *U.S. cert. denied*, 400 U.S. 908 (1970), the Court held that where all the occupants of an automobile had been properly arrested, the police had the right to remove and impound the automobile and inventory its contents. Items discovered in the trunk during the inventory were held to be admissible in evidence in defendants' trial for burglary. The Court referred to other California cases as follows:

"*People v. Superior Court*, 2 Cal.App. 3d 304, 309, 82 Cal. Rptr. 766, 770, in an irrelevant context, states, 'Evidence found in an "inventory" preparatory to a "proper impound" is not the result of a "search."' The court in *People v. Marchese*, supra, 275 A.C.A. 1135, 80 Cal.Rptr. 525, found a police impound and inventory, following a 'drunk driving' arrest which disclosed narcotics in the car's locked trunk, to be proper and part of a "'customary and well justified procedure"' with 'no question of its constitutionality.' (P. 1139, 80 Cal. Rptr. p. 527.) The court, however, pointed out that such an inventory must be in 'good faith' and, citing earlier authority, noted that it "'cannot be used as a subterfuge to cover up otherwise illegal activity, i.e. where the officers are actually engaged in the process of ferreting out evidence to be used in a criminal prosecution they cannot justify such activity under the guise that they were making 'an inventory' for purpose of impounding.'" (P. 1138, 80 Cal. Rptr. pp. 526-527.) In that case it was held proper to list in detail the contents of a duffel bag for 'Little protection to the officer, the owner and the garageman would be afforded if all the of-

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ficer could list would be "one duffel bag." (P. 1140, 80 Cal. Rptr. p. 528.) In *People v. Superior Court*, 275 A.C.A. 694, 80 Cal. Rptr. 209, a 'drunk driving' arrest preceded a car's impound and inventory during which narcotics were found in the trunk. Held, the evidence was properly seized. *People v. Sesser*, 269 Cal. App. 2d 707, 75 Cal. Rptr. 297, concerned an automobile driver's robbery arrest after which incriminating evidence was found in the glove compartment. The court approved, saying, "The search in fact in this instance appears to have been an inventory episode incident to the impounding of the car." (P. 711, 75 Cal. Rptr. p. 299.) 6 Cal. App. 3d at 435-436, 85 Cal. Rptr. at 912-913.

In *People v. Sullivan*, 29 N.Y. 2d 69, 272 N.E. 2d 464 (1971), an unattended vehicle left in the wrong place was impounded by New York police. Police department regulations required that the officer removing the vehicle make an adequate record of valuable property in the vehicle. The officer examining the vehicle observed a black plastic brief case. He opened it and found that it contained a loaded pistol. Defendant was indicted for possessing a loaded gun as a felony. The Supreme Court dismissed the indictment. The Appellate Division of the Supreme Court affirmed. The Court of Appeals reversed and ordered the indictment reinstated holding that there was no unreasonable search and the pistol was admissible. The Court said: "A 'search' is an intrusion under color of authority on an individual's 'vehicle', 'for the purpose of' seizing things. (Tentative Draft No. 3. 1970, art. 1, §§ 1.01, Sub d [1]) [referring to Model Code of Pre-Arrest Procedure of the American Law Institute]. This is just what the inventory examination in the present case is not." 29 N.Y. 2d at 77, 272 N.E. 2d at 469. See also *State v. Tully*, 166 Conn. 126, 348 A. 2d 603 (1974), where the officer conducting the inventory opened a knapsack on the seat of the car to inventory its contents and discovered cocaine. The Court held the procedure to be proper.

In *Godbee v. State*, 224 So. 2d 441 (Fla. 1969), defendant was lawfully arrested on a fugitive charge. Two deputies sheriff were engaged in an investigation of a homicide. One had in his possession a warrant for the arrest of defendant on worthless check charges. While they were so engaged, defendant drove up and parked his car illegally on the sidewalk, got out of the car and locked it. The deputy with the warrant recognized defendant and

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served the warrant, placing defendant under arrest. Defendant requested permission to make a phone call. The officer allowed him to go to a nearby store for that purpose. He failed to return and the officers discovered that he had absconded. They caused the car to be towed to a storage area. Two days later they inventoried the contents, forcing open the car. They found an assortment of items which had price tags on them, indicating they had previously belonged to a sporting goods store. Much of the merchandise was in the trunk of the car. The officers testified that it was routine procedure for the sheriff's office to inventory personal property in motor vehicles in their custody, under these circumstances. The Court, in holding the procedure reasonable and the evidence admissible, pointed out the distinction between an "inventory" search and an "exploratory" search; "a valid though perhaps delicate distinction which must depend upon the totality of circumstances in each case", and said:

"The reasonableness of any search without a warrant is measured from the standpoint of the conduct of the searchers. If their conduct is in some way reprehensible; or if they precipitate a search and are motivated therein solely by a desire to 'hunt' for incriminating evidence; or if they do so without any plausible explanation or justification; the invasion is an unreasonable one." *Id.*, 224 So. 2d at 443. *See also Urquhart v. State*, 261 So. 2d 535 (Fla. 1972).

In *Heffley v. State*, 83 Nev. 100, 423 P. 2d 666 (1967), defendant was properly arrested and his car taken to the police station. A residence had been burglarized, and among the items stolen were passports and a vehicle title and registration. Less than a month later defendant was waiting for a stop light, and an officer, responding to a radio report that a person driving a car which fitted the description of defendant's was attempting to sell guns to pawn shops, came up and began interrogating him. The officer saw a pistol sticking out from under the driver's seat, and there were several guns piled in the back seat. Defendant was arrested for possession of the pistol and taken to jail, and his car was driven by the officer. A search was made of the car, including the trunk and under the hood. On the floor by the rear seat he found two passports and two certificates of registration. The guns and these items were listed by him. Defendant contended the items linking him to the burglary were inadmissible because fruits of an

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illegal search. The Court, in holding the evidence admissible, said:

"... The police officer, when there is just cause, has a duty not only to impound a car from the public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. Such practice is deemed necessary to defeat dishonest claims of theft of the car's contents and to protect the temporary storage bailee against false charges. *People v. Ortiz*, supra. If, however, the policing conduct indicates that the intention is exploratory rather than inventory the fruits of that search are forbidden. *People v. Garrison*, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (1961). Unfortunately, distinguishing inventory from exploration may prove to be ambitious and unprecise. We can only say that each case must be determined upon its own facts and circumstances.

The historical difference in treatment between buildings and automobiles justifies the inventory procedure used by the police. The fundamental right of privacy connected with a man's home is understandably different and in greater need of protection than an automobile on the public right of way. In the latter case the police and other people using the public highway, as well as the owner of the vehicle, have an interest which must be protected. *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924)." 83 Nev. at 103-104, 423 P. 2d at 668.

See also State v. Wallen, 185 Neb. 44, 173 N.W. 2d 372 (1970), where defendant was arrested and jailed for drunkenness. His car was stalled outside the entrance to a military base and could not be moved on its own power. Clothing and suitcases were plainly visible. The automobile was towed to a fenced lot. The patrolman inventoried its contents, including the locked trunk which he unlocked with a key in the ignition. There he found, upon checking the contents of a vanity box, gambling paraphernalia. Gambling devices were also located in the glove compartment. The defendant was then charged with keeping gambling devices for the purpose of playing a game of chance for money. The Court held that the officer had a duty to have the car removed and a

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duty to inventory the contents and, therefore, since there was no evidence that the inventory was a subterfuge for an unlawful search for evidence to convict for a crime, the evidence was admissible.

And in *City of St. Paul v. Myles*, 298 Minn. 298, 218 N.W. 2d 697 (1974), the Court upheld the conviction of defendant for illegal transportation of a firearm where the defendant's car was impounded after his arrest for assault and a traffic violation, and the officer, upon inventorying its contents, discovered an automatic pistol in the glove compartment. The Court noted that the procedure was proper and that the inventory should include not only property discovered in plain view, but all valuables within the vehicle. The Court said:

"... We are aware that there is a potential for abuse by the police of the inventory procedure. An exploratory search for evidence may be conducted under the pretext of inventorying the contents of an impounded vehicle. We do not believe, however, that the potential danger of illegal searches conducted under the pretext of an inventory is sufficiently great to prohibit all inventories of impounded vehicles. The police will generally be able to justify an inventory when it becomes essential for them to take custody of and responsibility for a vehicle due to the incapacity or absence of the owner, driver, or any responsible passenger. In the case of an arrest, it must be shown that the arrest or arrests themselves were proper. In the present case, the police became responsible for the car when the defendant and his passengers were placed under arrest. The record does not show that these arrests were merely a pretext to enable the officers to search the car." 298 Minn. at 304-305, 218 N.W. 2d at 702.

Federal courts have also upheld the inventory procedure as not violative of the Fourth Amendment proscription against unreasonable searches and seizures. See: *U. S. v. Lipscomb*, 435 F. 2d 795 (5th Cir. 1970), *cert. den.*, 401 U.S. 980 (1971), *reh. den.*, 402 U.S. 966 (1971); *U.S. v. Pennington*, 441 F. 2d 249 (5th Cir. 1971), *cert. den.*, 404 U.S. 854 (1971); *Lowe v. Hopper*, 400 F. Supp. 970 (S.D. Ga. 1975), *aff'd per curiam*, 520 F. 2d 1405 (5th Cir. 1975); *United States v. Smith*, 340 F. Supp. 1023 (D.C. Conn. 1972);

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United States v. Fuller, 277 F. Supp. 97 (D.C. D.C. 1967) (where drugs were found inside eye glass case located on the front seat); *United States v. Gerlach*, 350 F. Supp. 180 (E.D. Mich. 1972) (where counterfeit bills found in a box in the trunk and a wallet containing identification found beneath the front seat); *United States v. Kelehar*, 470 F. 2d 176 (5th Cir. 1972) (where counterfeit money was found under a floor mat and where officer testified he felt reasonably certain contraband would probably be discovered in the inventory process).

[1] From these cases it appears that in order for an inventorying process not to violate the Fourth Amendment proscription against unreasonable searches and seizures, the State must show that the automobile was lawfully impounded, there being a demonstrable need for its impoundment; that the driver was not arrested as a subterfuge for searching the vehicle; that the inventory was reasonably related to its purpose which is the protection of the owner from loss, and the police or other custodian from unjust claims; that the inventory itself was reasonable and not exploratory in character; that the inventory was actually conducted under circumstances indicative of a true protective examination of the contents of the vehicle. See *State v. All*, 17 N.C App. 284, 193 S.E. 2d 770 (1973), *cert. den.*, 283 N.C. 106 (1973), U.S. *cert. den.*, 414 U.S. 866 (1973), *reh. den.*, 414 U.S. 1086 (1973).

[2] When those principles are applied to the case *sub judice*, we cannot say that the inspection and inventory was pretextuous with an expected result so far as turning up evidence is concerned. See *Lowe v. Hopper*, *supra*. The defendant was lawfully arrested, and he does not contend otherwise. The arresting officer determined that it would be unsafe to leave defendant's car at that particular location because of the probability of vandalism and directed his fellow officer to begin a "vehicle inventory form" on the car in accordance with §§ 20-11 and 20-20 of the Charlotte Code. The procedure requires that

"The inventory will be completed by viewing the contents of the interior of the vehicle (glove box, console, under the front seat, rear passenger area) for items of value. The trunk of the vehicle will also be inventoried. (If the spare tire or jack is missing, note on your inventory that these items are miss-

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ing.) The inventory should contain only items of value, such as tape decks, tapes, CB radio tools, clothing, etc.

b. At no time during the inventory will any suitcases, boxes, or other sealed or locked items be opened. Enter a brief description of the item on the inventory and secure the item in the vehicle by locking it in the trunk.

c. When finished, the inventory will be signed by the officer towing the vehicle (if present) and the wrecker driver. The white copy of the vehicle inventory will be turned in with the Tow-in and Storage Report. The owner or driver will be given the pink copy, the wrecker driver will received the blue copy, and the officer will keep the yellow copy."

After the arresting officer had asked his fellow officer to begin the inventory, he began the search of defendant when he found the large sum of money in his sock and obtained the key to the glove compartment. Defendant told the officer that the key which was in his shoe and which he tried to throw away was to the glove compartment. When the contraband was discovered, the inventory was stopped, one officer followed the car to the police garage and the other obtained a search warrant so that the rest of the car could be searched. The good faith of the officer is readily apparent. In our opinion distinguishing inventory from exploration in this case presents no difficulty.

No error.

Judge ERWIN concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

The Supreme Court of the United States has said that warrantless searches are per se unreasonable under the Fourth Amendment unless they come within a few "jealously and carefully drawn" exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L.Ed. 2d 564, 576, 91 S.Ct. 2022, 2032, *reh. den.* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). The exceptions treated in *Coolidge* include (1) searches incident to a lawful arrest, (2) prob-

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able cause and exigent circumstances, and (3) plain view. Other exceptions which have been found by the Supreme Court are (4) hot pursuit, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967); (5) consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973); (6) stop and frisk, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); and (7) inventory searches of automobiles, *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed. 2d 1000 (1976). In my opinion, the search in this case falls within none of these exceptions.

Of the seven exceptions set out above, only three could possibly apply to the fact situation before us: (1) searches incident to a lawful arrest, (2) probable cause with exigent circumstances, and (7) inventory searches. The search here exceeds the permissible scope of searches incident to a lawful arrest, however, since such searches are limited to the person and the area from within which he might have reached weapons or destructible evidence. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969). The search incident to the arrest of the defendant here took place outside the vehicle, so a search of the interior of the vehicle, and particularly the *locked* glove compartment, would not be within the area of a "Chimel" search.

Nor is this a case of probable cause with exigent circumstances. First, there is no showing of probable cause to search the vehicle. The Supreme Court has distinguished situations where such probable cause is present, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419, *reh. den.* 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970) (proper to search vehicle for guns and stolen money where its occupants were apprehended for robbery), from those such as *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964), where it is absent. In *Preston* the arrest was for vagrancy, and "it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto." *Chambers v. Maroney*, *supra* at 47, 90 S.Ct. at 1979, 26 L.Ed. 2d at 426. Here, as in *Preston*, the grounds for the arrest gave the officers no probable cause to search the car for evidence of crime.

Second, even if probable cause to search had existed, there is no showing of exigent circumstances sufficient to bring this case within the reasoning of *Carroll v. United States*, 267 U.S. 132, 69

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L.Ed. 543, 45 S.Ct. 280 (1925), that a warrantless search is permissible "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality." *Id.* at 153, 69 L.Ed. at 551, 45 S.Ct. at 285. Here the defendant was arrested for speeding and for an outstanding traffic warrant, and was going to jail. He would have had no access to the car to destroy anything inside it during the time it would have taken the officers to obtain a search warrant. The search cannot be justified under this exception.

The majority has found that this search of defendant's automobile comes within the exception for inventory searches, but I cannot agree. In my opinion this case is not within the purview of *South Dakota v. Opperman*, *supra*, relied on by the majority. In *Opperman* an illegally parked, unoccupied vehicle was towed to the city impound lot, and an inventory search there revealed a bag of marijuana. The court in that case upheld routine police inventories, recognizing that they served three needs: the protection of the owner's property while it remains in police custody, the protection of the police against disputes over lost or stolen property, and the protection of the police from potential danger.

The court also noted that "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive." *Id.* at 376, 49 L.Ed. 2d at 1009, 96 S.Ct. at 3100. Other cases relied on by the majority reiterate this requirement that there be no investigatory motive. *E.g. People v. Andrews*, 6 Cal. App. 3d 428, 434, 85 Cal. Rptr. 908, 912 U.S. *cert. den.* 400 U.S. 908 (1970). ("[S]uch an inventory must be in 'good faith' and . . . 'cannot be used as a subterfuge . . . , i.e. where the officers are actually engaged in the process of ferreting out evidence to be used in a criminal prosecution they cannot justify such an activity under the guise that they were making 'an inventory''"") In my opinion the search in the present case contains more than a suggestion that the "inventory" was a pretext concealing an investigatory motive. Officer Christmas stopped the defendant and told him he was going to give him a citation for speeding. Officer Barnes arrived at that time, and as he testified: "I knew the Defendant before and I knew the Defendant as a known drug dealer, and I related this information to Officer Christmas. I suspected that he had drugs on his person."

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* * * *

Q. And you knew you all were looking for him and keeping out an eye for him and would stop him any chance you got to check him out, didn't you? Wouldn't you?

A. Yes, sir.

Q. You would have done that?

A. Yes, sir.

Q. And that's exactly why he was stopped on this day in question to be searched to see if he had any drugs on him, wasn't it?

A. I didn't stop him.

Q. Well, you would have stopped him had you seen him, wouldn't you?

A. Yes, sir. I would have.

Having learned the defendant's identity, Officer Christmas requested a radio check, and defendant was then arrested on an outstanding warrant and his car searched. This is a very different fact situation from the true inventory situation of *Opperman* and other cases relied on by the majority, where an unoccupied car, frequently illegally parked or abandoned, is taken into police custody.

The courts in the "inventory search" cases and the majority here also rely on the fact that inventories are "standard" or "routine" police procedures. Even assuming that such "standardness" makes the searches more acceptable, it is clear from the record that the officers here were not following the "Vehicle Towing & Inventory Procedure" set out by their police department:

B. Citizens should be allowed to make disposition of their vehicles when:

1. The driver or owner is on the scene.
2. In the officer's judgment the subject is capable of making such disposition.
3. Said disposition does not interfere with the case or create a traffic problem.

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In the present case defendant was on the scene and there is no indication in the record that he was incapable of making disposition of the vehicle, or that disposition by the defendant would have interfered with the case or created a traffic problem. Officer Christmas, asked why he had decided to have the car towed and inventoried, cited only the "possibility of the car being stripped, possibly stolen, hubcaps stolen, vandalism to the car." This danger could have been guarded against, and the protective purposes of inventory set out by the Supreme Court served, equally well by allowing defendant the option to make disposition of the car without an inventory search.

Because this case does not fit within any of the exceptions which justify warrantless searches, I would reverse.

STATE OF NORTH CAROLINA v. F. E. RUDOLPH

No. 7810SC749

(Filed 2 January 1979)

1. Solicitors § 1— "career criminal" program—prosecution thereunder not abuse of district attorney's discretion

Defendant's contention that the district attorney's "career criminal" program was essentially a non-legislative enactment of a criminal recidivist law and that prosecution of defendant under the program amounted to a denial of due process and equal protection is without merit since, under his "career criminal" program, the district attorney was implementing a policy of vigorous prosecution using such means as concentrating available manpower on career criminal trials, pursuing tough plea bargaining policies, advocating more restricted pretrial release, and arguing for more severe punishments; these actions were well within the broad prosecutorial discretion recognized by the courts; and the prosecution was not required to provide defendant with a full written description of the "career criminal" program, since G.S. 15A-903 does not entitle defendant to information on the internal policies of the district attorney's office.

2. Searches and Seizures § 11— warrantless search of vehicle and defendant—probable cause—admissibility of evidence seized

Evidence discovered in a search of the car and the person of defendant incident to a warrantless arrest was admissible in a prosecution for robbery with a firearm where the evidence tended to show that officers stopped the car because it matched the description of the robbery suspect's vehicle and they had been informed that the three occupants were suspects in the robbery; moreover, the flight of one of the occupants of the vehicle and the

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discovery of what appeared to be the robbery weapon in the plain view of the officers were sufficient to ripen the suspicion of the officers into probable cause to make an arrest.

3. Robbery § 5.1; Criminal Law § 112.4— jury instructions—erroneous instruction not prejudicial

In a prosecution for robbery with a firearm, the trial court's statement that the State must prove that defendant took away "the property of another, with the consent of the owner" was a misstatement obvious to even a lay person and was not prejudicial to defendant in light of the context of the misstatement, the lapse of time from the misstatement until the jury deliberations, and the correct final charge to the jury. Nor was defendant prejudiced by the court's obvious misstatement that the State's evidence must be consistent, rather than inconsistent, with defendant's innocence in order for the jury to find him guilty of the crime charged where such *lapsus linguae* was not called to the attention of the court, and it does not appear that the jury could have been misled by the statement.

4. Criminal Law § 79— acts of accomplices—admissibility of evidence

Evidence with respect to the conduct of defendant's accomplices was admissible in a prosecution for robbery with a firearm and did not deny defendant the right to confront his accusers.

5. Criminal Law § 60.5— palm print—admissibility of evidence

In a prosecution for robbery with a firearm, evidence concerning defendant's palm print found on a stolen cash register was properly admitted.

6. Criminal Law § 60.2— fingerprint file not admitted—no reference to other crimes—reference to file not inadmissible

Defendant's contention that testimony which referred to a fingerprint file on defendant was inadmissible because it amounted to evidence of other distinct or separate offenses committed by defendant is without merit, since the file itself was not passed to the jury and no charges appearing on the file were communicated to the jury.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 15 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 November 1978.

Defendant was tried on indictments charging him with larceny of a firearm and robbery with a dangerous weapon. The jury returned a verdict of guilty on the charge of robbery with a dangerous weapon and found defendant not guilty of larceny of a firearm.

The evidence is summarized below except to the extent the record is quoted: At about 8:00 p.m. on 29 December 1977, Shirley Holleman (referred to herein as "Holleman") was on duty as cashier at the Variety Pic-Up store in Wake County near Willow Springs. While behind the counter, Holleman was startled by the

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presence of three black males. She had not heard a vehicle approach the store. She testified that one of the individuals was short and heavy, wore a stocking over his head, and carried a rifle. The second male was described only as tall, and no description was given of the third person other than that he was a black male. Holleman could not positively identify the defendant as one of the three individuals who robbed the store.

As she was directed to do, Holleman lay down behind the counter, and the man carrying the gun placed it at her head and warned her that if she moved he would "blow her head off". She remained on the floor until Mr. and Mrs. Eddie Wood Thornton entered the store moments later. Holleman stood up and realized for the first time that the cash register had been stolen. Mr. Thornton saw three black males, two of them carrying an object, crossing the road toward a dark colored Oldsmobile. He noticed a black female in the driver's seat and took down the license number of the car. After Thornton entered the store and found Holleman, he proceeded across the street to report the incident to Wake County A.B.C. Officer Leon Smith who was patronizing Olive's Cash Grocery. Smith reported by radio to Wake County Deputy Sheriff Baldwin that the Variety Pic-Up had been robbed and that three males were observed leaving the scene in a dark-colored Oldsmobile driven by a black female. Subsequently, Holleman regained her composure and gave to Smith the same description of the individuals as was later given at trial. These descriptions were reported to the sheriff's department by radio.

Deputy Baldwin heard the robbery report over the radio and recognized the license number which he knew properly belonged to a Katherine Battle and did not belong on the automobile involved in the robbery. Baldwin knew that Willie Jones owned an Oldsmobile fitting the general description of the car seen by Thornton. He also knew where Jones lived, that defendant lived with Jones, and that they both lived in a house with Geraldine Carter. Baldwin also had information that defendant and Clainey McKinney had been "running together". At the time of the report Baldwin knew defendant and had once stated that defendant would "steal anything he got his hands on". From the report and descriptions, Baldwin "was not positive that these people were involved in it but felt like they were involved in it".

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Deputy L. M. Council was on duty on 29 December 1977 and was directed by Baldwin to proceed to Prince's Grocery, near defendant's residence and about ten miles from the Variety Pic-Up, to watch for the Oldsmobile. He arrived at about 8:15 p.m. At 8:20 p.m. Council drove to defendant's residence and noted the presence of defendant's yellow 1967 Chevrolet and a 1969 Mercury, but no Oldsmobile. He did not stop to see if anyone was in the house, instead he returned to his post at Prince's Grocery. At the time the deputy passed defendant's house insufficient time had elapsed from the time of the reported robbery for someone to have traveled the ten miles from the Variety Pic-Up. Around 8:30 p.m. Council stopped an Oldsmobile that he soon determined was not the automobile involved in the robbery. Shortly thereafter Council returned to his post at Prince's Grocery and observed defendant's car occupied by three persons. He pursued the automobile along NC 55 to US 1 and onto Hillsborough Street in Raleigh. Council then, through the sheriff department's dispatcher, requested assistance from the Raleigh police, and returned to Holly Springs.

Raleigh Police Officer J. M. O'Shields began following the vehicle at the Raleigh city limits. He observed a black male driver, a black female in the front seat, and a black male in the back seat. He noticed that one of the passengers kept turning around to watch his car. Officers E. O. Lassiter and F. W. Mitchell were also following defendant's vehicle. Defendant's vehicle was stopped on Holden Street in Walnut Terrace at about 9:30 p.m. O'Shields blocked the front of the automobile; Lassiter blocked it from behind. The passenger in the back seat, later identified as Clainey McKinney, was apprehended by O'Shields after trying to flee after the car was stopped. As the officers approached his car, defendant stepped out from the driver's seat and upon request produced his driver's license. Officer Lassiter explained why he had been stopped and advised him of his constitutional rights. While defendant was being questioned, Officer Mitchell approached the automobile and made a visual search from outside the automobile by shining his flashlight into the interior. Mitchell observed what appeared to be the butt of a rifle or shotgun which was partially wrapped in a coat and lying on the back seat of the car. There was also two five-dollar bills lying on the floorboard beneath the steering wheel. Mitchell informed Lassiter of what he

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had observed in the car and Lassiter placed defendant under arrest.

Prior to stopping defendant's car, the Raleigh police officers assisting the sheriff's department had been given a description of the vehicle and were informed by the police dispatcher that the three occupants were suspects in an armed robbery. The officers were also informed that the suspects were possibly armed with a shotgun or rifle and that they were to follow and stop the vehicle. The officers were also apparently aware that defendant was owner of the vehicle and that one of the passengers was possibly Clainey McKinney, who was at that time wanted under an arrest warrant for forgery.

After the arrest, Deputy Andy Young went to Walnut Terrace where he recieved the 30-30 rifle seized by Officer Mitchell. Deputy Young then took defendant to the sheriff's office where a search of the defendant's person revealed that defendant had \$81.84 in cash consisting of two ten-dollar bills, eight five-dollar bills, eleven one-dollar bills, six quarters, two dimes, two nickels, and four pennies.

On the same evening, Deputy Joe Gerald was in the vicinity of Willow Springs looking for the Oldsmobile involved in the robbery. It was spotted at Hood's Service Station where Willie Jones was adding oil to the engine. Gerald looked into the back seat of the car and saw a heavy imprint left on the cushion along with loose change and dirt on the seat. After the deputy questioned Willie Jones briefly, Jones fled and was not apprehended until later the next day. At 11:30 p.m. Clainey McKinney led Deputy Council to the county landfill, where he recovered the stolen cash register.

At trial W. E. Hinsley from the City/County Bureau of Identification testified that a certain file dated 6 May 1975 contained a complete set of prints of defendant. Phillip D. Robbins from the Bureau of Identification testified that he had taken palm prints from the cash register and that these prints matched those of defendant which were on file with the Bureau. The fingerprint file was not passed to the jury.

From denial of the several motions to suppress evidence, a motion for nonsuit, a motion to set aside the verdict and to grant

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a new trial, and entry of judgment sentencing defendant to 25 years in the State's prison, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Davis, Hassell, Hudson, & Broadwell, by Charles R. Hassell, Jr., for defendant appellant.

MORRIS, Chief Judge.

The defendant has brought forward on appeal numerous exceptions and assignments of error. We note initially that defendant has failed to comply strictly with the requirements of Appellate Rule 28(b)(3) by not properly setting forth a reference to the exceptions and assignments of error following each question presented in the argument portion of his brief. Nevertheless, because such references were properly made under the "Issues Presented" portion of the brief, and the appellant has otherwise conformed with the rules of appellate procedure, we will consider the arguments. The assignments of error will be addressed in the order they appear in defendant's brief.

[1] Defendant first assigns as error the trial court's denial of his motions to (1) dismiss the charges (G.S. 15A-954), (2) modify conditions for his release pending trial (G.S. 15A-538) "to allow his release on his written promise to appear", and (3) motion for discovery (G.S. 15A-901 *et seq.*) seeking, among other things, "[a] full written description of the so-called 'career criminal' program . . . including the criteria utilized by the District Attorney and the procedure to be followed in the prosecution of [the] case." Defendant argues that the district attorney was without authority to initiate the "career criminal" program and that by singling out the defendant to be given swift prosecution, his opposition to "reasonable" bail, refusal to plea bargain, and his opposition to discovery of the "career criminal" criteria amounted to a denial of due process and equal protection under the United States and North Carolina Constitutions. For the reasons explained *infra*, we reject defendant's arguments.

Defendant asserts that the district attorney's program was essentially a non-legislative enactment of a criminal recidivist law. However, there is a fundamental distinction between the Wake County district attorney's policy for the prosecution of

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"career criminals" and prosecution under criminal recidivist statutes. Under the former, the district attorney is implementing a policy of vigorous prosecution using such means as concentrating available manpower on career criminal trials, pursuing tough plea bargaining policies, advocating more restricted pretrial release, and arguing for more severe punishments. These actions are well within the broad prosecutorial discretion long recognized by the courts in this State and require no legislative enactments. See *State v. Furmage*, 250 N.C. 616, 109 S.E. 2d 563 (1959). The exercise of this discretion is beyond constitutional reproach so long as the prosecutorial decisions and policies are not based upon impermissible motives such as bad faith, race, religion, or a desire to prevent the exercise of a constitutionally guaranteed right. See *United States v. Smith*, 523 F. 2d 771 (5th Cir. 1975); *United States v. Berrios*, 501 F. 2d 1207 (2d Cir. 1974). Moreover, even conscious selectivity in the exercise of the prosecutor's discretion, such as a deliberate decision not to implement a specific policy in certain cases, is valid absent an unconstitutional standard or arbitrary classification. See *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962); *Spillman v. United States*, 413 F. 2d 527 (9th Cir. 1969). Defendant has come forward with no evidence whatsoever that impermissible standards have been used. Defendant's substantive due process and equal protection attacks have no basis whatsoever in the record.

The recidivist statutes, to which defendant has equated the career criminal program, provide by law for more severe penalties upon the conviction of a person falling within the applicable statutory criteria. Application of such recidivist statutes, because they directly affect the defendant's liberty interests, triggers traditional procedural due process rights of reasonable notice and a right to be heard, *Oyler v. Boles*, *supra*. Similarly, the proceedings established to determine which defendants fall within the statutory criteria are critical stages of the legal process at which a defendant is entitled to legal representation. *Chewning v. Cunningham*, 368 U.S. 443, 82 S.Ct. 498, 7 L.Ed. 2d 442 (1961). However, such procedural due process rights do not arise upon the implementation of the district attorney's program. The defendant's procedural and substantive rights guaranteed by law are not altered by the policy.

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Furthermore, the prosecution was not required to provide defendant with "a full written description of the so-called 'career criminal' program under G.S. 15A-903(d). These documents are not "material to the preparation of the defense", "intended for use by the State as evidence", or "obtained from . . . the defendant". Defendant was informed by letter from the prosecution as to why he was being prosecuted as a "career criminal". Such information was voluntarily provided as a matter of professional courtesy and cooperation. G.S. 15A-903 does not entitle defendant to information on the internal policies of the district attorney's office. See G.S. 15A-904.

[2] Defendant next argues that the court erred in denying his motion to suppress evidence and erred in admitting evidence seized incident to the warrantless arrest of defendant. Defendant contends there was no probable cause for the arrest and that any evidence subsequently obtained as a result of the illegal arrest was inadmissible.

G.S. 15A-401(b)(2) provides that an arrest may be made without a warrant if the officer has probable cause to believe the person to be arrested has committed a felony. There is probable cause for arrest "if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon." *State v. Shore*, 285 N.C. 328, 335, 204 S.E. 2d 682, 686 (1974). Furthermore, it is permissible for police officers to make, in the course of a routine investigation, a brief detention of citizens upon a reasonable suspicion that criminal activity has taken place. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). Moreover, when incriminating evidence comes to the officer's attention during detention, such evidence may establish a reasonable basis for finding the probable cause necessary for effecting a warrantless arrest. *United States v. Harflinger*, 436 F. 2d 928 (8th Cir. 1970); *State v. Allen*, *supra*.

The evidence indicates that the initial detention of defendant and his vehicle was justified. The officers had received an accurate description of the suspect's vehicle through the police dispatcher and were informed that its three occupants were suspects in a recently perpetrated crime. See generally *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925);

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State v. Jones, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978); *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976). Even assuming, *arguendo*, the absence of probable cause to make an immediate arrest of the suspects, the flight of Clainey McKinney and the discovery of what appeared to be the robbery weapon in the plain view of the officers was sufficient to ripen the suspicion of the officers into probable cause to make an arrest. The evidence discovered in a search of the car and the person of the defendant incident to the arrest was admissible. See *State v. Jones, supra*; *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477 (1968); *State v. Johnson*, 29 N.C. App. 534, 225 S.E. 2d 113 (1976).

[3] Defendant next assigns as error misstatements of the law by the trial court in its charge to the jury. The first misstatement occurred in the trial court's initial comments to the jury prior to the taking of evidence. In describing the State's burden of proof on the charge of robbery with a firearm, the court declared that the State must prove beyond a reasonable doubt that "the defendant took and carried away a cash register and money, the property of another, *with the consent of the owner*. . . ." Technically the court erred in failing to use the word "without". The instruction appeared in the record in the following context:

" . . . For you to find the defendant guilty of these offenses, the State must prove by evidence beyond a reasonable doubt that the defendant, F. E. Rudolph took and carried away a firearm, the property of another, *without the consent of the owner*, knowing that he had not the right to take it and intending at the time to deprive the owner of its use permanently.

For you to find the defendant guilty of robbery with a firearm or other dangerous weapon, the State must prove beyond a reasonable doubt by evidence that the defendant took and carried away a cash register and money, the property of another, *with the consent of the owner*, knowing that he had not the right to take that property and intending at the time to deprive the owner of its use permanently; . . . "

Considered in that context, we believe the jury could not have been misled by the trial court's *lapsus linguae*. This misstatement is obvious even to a lay person. Furthermore, it is clear

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from the record that in the court's final charge, the jury was instructed properly that the property must have been taken *without* consent of the owner. Considering the context of the initial misstatement, the lapse of time from the misstatement until the jury deliberations, and the correct final charge to the jury, we conclude that defendant could not have been prejudiced by the error. *See State v. Sanders*, 280 N.C. 81, 185 S.E. 2d 158 (1971).

Defendant also asserts that the court's misstatement of the law concerning proof by circumstantial evidence was prejudicial error thus entitling him to a new trial. The court erroneously instructed, "... [Y]ou must be satisfied beyond a reasonable doubt that the circumstantial evidence relied upon by the State is *consistent* with his innocence." (Emphasis added.) Not only is it possible that the court reporter erred in transcribing the instruction, it must have been obvious even to jurors without legal training that the court meant to say "inconsistent". Such misstatement, termed *lapsus linguae*, will not be held prejudicial if not called to the attention of the court and if it does not appear that the jury could have been misled by the statement. *State v. Willis*, 22 N.C. App. 465, 206 S.E. 2d 729 (1974); *see also State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967). Defendant's assignments of error relating to errors in the charge are overruled.

[4] Defendant next contends that the trial court erred in permitting testimony concerning conduct of defendant's accomplices in the robbery. He argues that permitting evidence regarding the conduct of his accomplices denies him the right to confront his accusers. He cites as authority *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), and *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed. 2d 222 (1971). It suffices to say that the cited cases, which apply to confessions of a co-defendant, do not support defendant's position. Evidence with respect to the conduct of defendant's accomplices, when relevant to show the operative facts in establishing defendant's criminal conduct, are admissible unless excluded by some other established rule of law.

[5] The admissibility of the State's evidence concerning a palm print found on the stolen cash register has been challenged by defendant. He asserts that this evidence should have been exclud-

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ed on the authority of *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). However, that decision does not establish a rule of evidence. As Justice Copeland carefully explained:

"... The only limitation this Court has imposed on the admissibility of fingerprint comparisons to prove the identity of the perpetrator of a crime is a requirement that the testimony be given by an expert in fingerprint identification. *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Helms*, 218 N.C. 592, 12 S.E. 2d 243 (1940); *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935); *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). We have repeatedly said that the testimony of a fingerprint expert is 'competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission.' *State v. Tew*, *supra* at 617, 68 S.E. 2d at 295; *accord*, *State v. Helms*, *supra*; *State v. Huffman*, *supra*; *State v. Combs*, *supra*.

The probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated. *See State v. Miller*, *supra*; *State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948); *State v. Combs*, *supra*. Ordinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury. *State v. Miller*, *supra*; *State v. Helms*, *supra*; *see State v. Combs*, *supra*. It is not a question of law to be determined by the court prior to the admission of fingerprint evidence." 291 N.C. at 488-489, 231 S.E. 2d at 839-840.

The rule on a motion for nonsuit is that "[f]ingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' (Citations omitted.)" 291 N.C. at 491-492, 231 S.E. 2d at 841. Nevertheless, there is circumstantial evidence other than the fingerprints tying defendant to the crime. Such other factors along with evidence of the fingerprints is sufficient to withstand the motion for nonsuit.

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[6] Finally, defendant argues that the testimony of the Bureau of Identification representative which referred to a fingerprint file on the defendant was inadmissible as an attempt to circumvent the well-established rule that in a prosecution for a particular crime, the State generally may not present evidence of other distinct, independent, or separate offenses when defendant has not testified. See 1 Stansbury's N. C. Evidence § 91 (Brandis Rev. 1973). In *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973), our Supreme Court addressed a similar problem when the fingerprint identification card was given to the jury. The Court was there concerned with possible references in the fingerprint file to prior charges against the defendant. The Court found no error in allowing the jury to see such records when reference to other specific crimes had been effectively deleted. In the case at bar the file was not passed to the jury, and no prior charges appearing on the file were communicated to the jury. Any inference arising from this testimony that defendant had a prior police record was not of sufficient force prejudicially to influence the jury in its deliberations. *Id.*; see also *State v. McNeil*, 28 N.C. App. 347, 220 S.E. 2d 869 (1976). Testimony referring to the fingerprint identification card was properly admitted.

No error.

Judges WEBB and MARTIN (Harry C.) concur.

ROBERT DEUTSCH, ANCILLARY ADMINISTRATOR OF THE ESTATE OF JERRY E. BEDDINGFIELD, DECEASED v. ELSIE FISHER, INDIVIDUALLY, ELSIE FISHER, ADMINISTRATRIX OF THE ESTATE OF FORREST FISHER, DECEASED

No. 7829DC142

(Filed 2 January 1979)

1. Pleadings § 34; Rules of Civil Procedure § 25— substitution of parties upon death—supplemental pleadings

The trial court properly permitted the substitution of administrators for the deceased parties by supplemental pleadings.

2. Trial § 4— no dismissal for failure to prosecute

The trial court did not err in failing to dismiss an action instituted in 1966 for failure to prosecute where both parties to the action died; there has been

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much activity in the case since 1973, slightly more than two years after the death of the original defendant; and defendant administratrix has lost no defense because of the passage of time. Furthermore, dismissal was not required under the doctrine of laches.

3. Rules of Civil Procedure § 25— motion to abate after judgment

A motion to abate under G.S. 1A-1, Rule 25(c) after the case had been tried and judgment rendered was properly denied.

4. Parties § 3.1; Vendor and Purchaser § 5— contract to sell land—specific performance—joinder of deceased seller's heir

The "widow and sole heir at law" of the deceased defendant was properly made a party to an action for specific performance of a contract to sell land.

APPEAL by defendant from *Gash, Judge*. Orders entered 9 January 1978, District Court, HENDERSON County. Heard in the Court of Appeals 14 November 1978.

On 7 February 1966, Jerry E. Beddingfield instituted an action against Forrest Fisher seeking specific performance of a contract for the sale of land. Fisher timely answered, denying that he had entered into a contract with plaintiff and affirmatively asserted that he was without sufficient mental capacity to enter into a binding contract at the time he was alleged to have signed a paper writing, and if he signed it as alleged, he did so by reason of undue influence exerted upon him by the plaintiff. This answer was filed on 3 January 1967.

On 18 July 1967, an order was entered allowing defendant's counsel to withdraw, and he was relieved of any further responsibility in the matter.

On 21 July 1968, plaintiff Jerry Beddingfield, died intestate, a resident of Virginia. Dolores Beddingfield qualified as the administratrix of his estate, and, upon her death, Larry and Pamela Beddingfield were qualified as administrators. No ancillary administrator was appointed in North Carolina.

On 11 March 1969, Forrest Fisher, defendant, died intestate, a resident of Henderson County. Elsie Fisher, his widow and sole heir at law, qualified as administratrix of his estate, and filed her final account as such on 2 April 1971.

The lawsuit lay completely dormant until 2 May 1973, when it was transferred from the old county court to the newly created district court.

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On 8 May 1973, Don Garren, an attorney, moved the court that the complaint be amended to include the names of Larry and Pamela Beddingfield "as plaintiffs in the title" of the action and Elsie Fisher "as defendant in the title". The record is silent as to the party whom Mr. Garren represented. An order was entered allowing the motion, without notice having been given any party to the action.

On 5 July 1973, Elsie Fisher moved to dismiss pursuant to Rule 41 upon the ground that she had had no notice of the 8 May 1973 motion.

On 26 November 1973, Robert Deutsch qualified in Henderson County, as ancillary administrator of the estate of Jerry Beddingfield.

On 7 December 1973, an order was entered by the clerk directing that the Fisher estate be reopened and that Elsie Fisher continue to serve as administratrix thereof. Elsie Fisher objected and noted an appeal to the Superior Court.

On 10 December 1973, in response to another motion by Don Garren, an order was entered directing that Deutsch, ancillary administrator, be made a party plaintiff and that Fisher, administratrix be made a party defendant and that the complaint be amended accordingly.

The case was tried in March 1975, resulting in a jury verdict for plaintiff. On 10 March 1975, an order was entered appointing Don Garren as commissioner to convey the property to plaintiff upon the payment of the contract price of \$6500.

On 19 March 1976, Elsie Fisher moved: (1) that Elsie Fisher, administratrix, and Robert Deutsch, ancillary administrator, be made parties defendant and plaintiff respectively, (2) that the action of the substituted plaintiff be dismissed for failure to prosecute since the death of the original plaintiff and the death of the original defendant, (3) that the judgment of 10 March 1975 granting specific performance be vacated and set aside because Elsie Fisher had never been made a party, (4) that the action abate, and (5) that a permanent injunction be issued enjoining the heirs at law of Jerry Beddingfield and the substituted plaintiff for prosecuting this action. All motions were denied, and Elsie Fisher appealed to this Court.

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Opinion in that appeal is reported in 32 N.C. App. 688, 233 S.E. 2d 646 (1977). We held that the judgment of 10 March 1975 must be vacated and set aside because the provisions of G.S. 1A-1, Rule 25(a) had not been followed, the Court noting that even if it could be assumed that the attempt to substitute parties *was* by supplemental pleading, the provisions of G.S. 1A-1, Rule 15(d), requiring that the service of supplemental pleadings be "upon reasonable notice and upon such terms as are just," had not been followed.

On 12 August 1977, the court entered an order reciting that the matter had come on to be heard subsequent to the opinion of this Court; that it had considered an oral motion of counsel for Fisher, administratrix, that a hearing be had pursuant to Rule 15(d) to "determine if either Robert Deutsch as Ancillary Administrator of the Estate of Jerry E. Beddingfield or Elsie Fisher as Administratrix of the Estate of Forrest Fisher should be permitted to serve supplemental pleadings;" that "Robert Deutsch and Elsie Fisher, as Administrators, are proper persons to make a motion to be made parties through supplemental pleadings". The court ordered that the 10 March 1975 judgment be vacated and set aside; that the notice of lis pendens filed on 8 May 1973 by Don Garren be set aside with proper notations by the clerk; that the lis pendens filed 12 April 1976 by James Coleman, "Attorney for defendant" be cancelled and set aside with proper notations to be made by the clerk; that the motion pursuant to Rule 15(d) of James Coleman be set for hearing on 24 August 1977 at 2 o'clock p.m.; and that any other pending motions be heard at that time.

The hearing thus set was continued to 25 August 1977. On that date counsel for Robert Deutsch, ancillary administrator, filed a "motion for supplemental pleadings and supplemental complaint" asking that "Robert Deutsch, Administrator of the Estate of Jerry E. Beddingfield be made a proper substituted party to this Cause of Action and adopt said complaint as plaintiffs (sic) and allow this action to be continued by the substituted party as the real party in interest." By the motion, the court was also asked to order that "Elsie Fisher, Administratrix of the Estate of Forrest Fisher be substituted as the defendant and as the real party in interest in this Cause of Action and allow this action to be continued against the substituted party, Elsie Fisher, Administratrix of the Estate of Forrest Fisher, deceased."

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Nothing further appears in the record until 9 January 1978 at which time two orders were filed and a supplemental complaint. One order recited that the court, on 25 August 1977, considered the motion filed by Arthur J. Redden, Jr., "representing the heirs of Jerry E. Beddingfield, deceased" requesting that he be allowed to file a supplemental complaint and that the "Judgment of the Court of Appeals has been complied with" by the court. The court found as facts: that Fisher, administratrix, was present, offered evidence, and was represented by counsel; that the parties "that are requested to be made additional parties are the proper Parties to have a cause of action and defend this cause of action"; that both Deutsch, administrator, and Fisher, administratrix, are "proper persons to make a Motion to Supplemental Proceedings or Supplemental Complaint"; that none of the parties, as a result of the lapse of time, has lost any "defenses or counterclaims"; that both Deutsch, administrator, and Fisher, administratrix, had reasonable notice of the hearing and were represented by counsel. The court concluded that "it would be just to allow said parties to file a supplemental complaint", and ordered that Deutsch, administrator, be allowed 15 days from the date of the judgment to file a supplemental complaint and Fisher, administratrix, be allowed 30 days in which to file an answer thereto.

Supplemental complaint was filed the same day. Thereupon the court entered an order making Deutsch, administrator, a party plaintiff and Elsie Fisher, individually, and Elsie Fisher, administratrix, parties defendant.

Appeal entries dated 10 January 1978 show that the "defendant Elsie Fisher, Administratrix of the Estate of Forrest Fisher, Deceased, has given due notice in apt time of appeal to the North Carolina Court of Appeals".

Arthur J. Redden, Jr., for plaintiff appellee.

James C. Coleman for defendant appellant.

MORRIS, Chief Judge.

This procedural quagmire can be aptly likened to the fabled Serbonian bog. Step by step extrication is difficult, if not virtually impossible. We shall, therefore, discuss the questions raised by appellant in the order discussed in her brief.

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It is appellant's position, by her first assignment of error, that this Court, in its previous opinion, in effect granted not only the motion to vacate and set aside the judgment of 10 March 1975, but, in addition, held that the action should be dismissed "because of the failure to comply with the Rules of Civil Procedure as well as the long delay in prosecuting the action". We do not so interpret the opinion. Appellant relies on the following paragraph from that opinion:

"In the case at bar, we note that substitution was attempted on May 8, 1973, more than four years after the death of the original parties. However, the record fails to reveal any findings by the trial judge as to whether this or any other factor was ever considered in determining whether the supplemental pleading was 'just'."

This statement was, of course, referring to an assumption for the purpose of argument only that the attempt to substitute parties was by supplemental pleading. However, at the August hearing defendant, Elsie Fisher, administratrix, offered evidence tending to show that counsel for her husband, the original defendant, died in March of 1970 (having withdrawn from the lawsuit in July, 1967); that the file in his office contained only a copy of the complaint, a copy of the answer, and some letters from counsel to original defendant with respect to the possibilities of settlement; that counsel's partner knew nothing about the lawsuit and particularly had no knowledge with respect to the affirmative defenses; that Elsie Fisher was not familiar with the affirmative defenses; that Elsie Fisher had only one conversation with counsel and that was when he asked her to sign a deed advising that he could get her more money; that she refused; that he never asked her about her husband's mental capacity.

[1] The court found that none of the parties had lost any "defenses or counterclaims" which he or she might have had; that both Deutsch, administrator, and Fisher, administratrix, had reasonable notice of the hearing; and that to allow movant to file a supplemental pleading "would be just in this cause of action".

We note that in the order of 12 August 1977, the court recited that James C. Coleman, attorney for Elsie Fisher, ad-

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ministratrix, orally moved that the court hold a hearing for the purpose of determining whether either Deutsch or Fisher should be permitted to serve supplemental pleadings, and the court set 24 August 1977 as the time for hearing that motion. At the hearing, Deutsch filed a written motion. The court, in its order, noted that both were proper parties to make the motion, that reasonable notice was given, and it "would be just to allow said *parties* to file a supplemental complaint". We note also that by written motion dated 19 March 1976, Elsie Fisher requested that Deutsch, administrator, and Fisher, administratrix, be made parties to the action.

We cannot discern how appellant can, in good conscience claim that she had no notice that the motion to allow supplemental pleadings would be heard.

[2] Nor can we agree that this Court indicated that the action should be dismissed for failure to prosecute. It is true that a long period of time has elapsed since the action was instituted. However, there has been much activity in the case since early in 1973, slightly more than two years after the death of the original defendant. It is also to be noted that the original plaintiff died in 1968, the first administratrix of his estate died, and successors were appointed. There is no evidence that defendant has lost any defenses. It would seem that she, better than anyone else, would be cognizant of her husband's mental capacity and would know those who could testify with respect thereto. In any event, we find nothing in the record before us which would indicate that the present plaintiff should not be allowed to prosecute the action. It may well be that a lapse of over seven years without some action taken by a plaintiff would require the application of the doctrine of laches. However, we are not willing to require its application in the very peculiar circumstances of this case. Appellant's first assignment of error is overruled.

By her second assignment of error appellant contends that her motion for dismissal, under Rule 41(b), filed 19 March 1976 should have been allowed. The motion was based on laches. The parties have filed a stipulation that this motion was orally denied by the court at the 25 August 1977 hearing, but the denial was not included in the order. Prior discussion is applicable, and this assignment of error is overruled.

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[3] Appellant next contends that her motion for abatement should have been granted. Again it is stipulated that the motion was denied by the court on 25 August 1977, but the denial was not included in the court's order. The motion to abate was dated 19 March 1976, after the case had been tried and judgment rendered. Appellant relies on G.S. 1A-1, Rule 25(c).

"(c) Abatement ordered unless action continued.— At any time after the death, insanity or incompetency of a party, the court in which an action is pending, upon notice to such person as it directs and upon motion of any party aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than 12 months from the granting of the order."

It is obvious this section is not applicable to this situation.

Appellant also urges that her motion, included in the above referred to motion, that "the parties plaintiff and alleged parties plaintiff and heirs at law of Jerry E. Beddingfield be forever enjoined from prosecuting this lawsuit" should have been allowed. This is also a subject of the stipulation that the court failed to include in its order the denial of this motion. Appellant again argues laches and further says: "Injunctive relief has long been available in North Carolina to enjoin civil actions instituted repeatedly on the same cause of action against the same defendants and, that is exactly the situation we have in this case. Robert Deutsch as Ancillary Administrator has constantly been initiating new actions on the same case (sic) of action since 1973 and, if injunctive relief is not granted, he will no doubt institute additional actions on the same cause of action." Assuming appellant's correctness as to the law stated, this record is completely barren of any indication of any kind that the present plaintiff has instituted any action other than the one before us or that he will do so. This assignment of error is without merit and overruled.

By her fifth assignment of error appellant challenges the order of the court allowing Robert Deutsch, as ancillary administrator, to file a supplemental complaint. Here the appellant again argues notice and whether it would be just to allow appellee to file a supplemental complaint. We have previously

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discussed both these questions. It is not necessary to do so again. Suffice it to say, the assignment of error is overruled.

[4] The sixth assignment of error is directed to the court's action in making Robert Deutsch, ancillary administrator, Elsie Fisher, individually, and Elsie Fisher, administratrix, parties to the action. The same reasons are advanced and have been answered. Additionally, appellant takes the position that since Elsie Fisher, individually, was not an original party, she should not now be made a party, particularly in view of the fact that there is no allegation that she signed a contract to convey the land. We simply point out that in the case reported in 32 N.C. App. 688, 233 S.E. 2d 646 (1977), and in the statement of facts presented by appellant, it is said that Elsie Fisher is the "widow and sole heir at law" of the original defendant. This assignment is overruled.

No new or additional argument is presented by the remaining two assignments of error, and the questions raised have been answered previously in this opinion. These assignments of error are also overruled.

We have not called to the attention of counsel for the parties all of the many procedural deficiencies existing, because, in our view, the trial court has reached the right result. To set out *in seriatim* the deficiencies and remand the case for their correction would be an exercise in futility and would only result in additional expense to the litigants. The law is not required to be that impractical.

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. JULIAN LEIGH STINSON, JR.

No. 7826SC758

(Filed 2 January 1979)

Searches and Seizures § 23— application for search warrant—personal observation of officer—probable cause shown

Information contained in an application for a search warrant was sufficient to justify a finding of probable cause by the magistrate and his issuance of the search warrant where such information consisted of allegations by an experienced vice investigator that, on the day before and the day of the search, he observed defendant drive his vehicle to a designated place, go inside a building, stand at an adding machine and tally some white paper slips which he believed to be lottery tickets; on the following day he observed the defendant's vehicle and someone who resembled defendant at the same place four minutes before the officer arrested two persons for violation of lottery laws and seized lottery tickets and money; the officer had knowledge of defendant's prior arrest record and reputation for lottery law violations; and this information based on personal observation was supported by information from a confidential informant, even though the informant's tip might not have been sufficient in itself to justify a finding of probable cause by the magistrate.

APPEAL by the State of North Carolina from *Griffin, Judge*. Judgment entered 22 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 November 1978.

The State of North Carolina, pursuant to G.S. 15A-979(c), appeals from an order quashing a search warrant and suppressing evidence discovered and seized on 15 February 1978 under a search warrant issued on said date at 11:52 a.m.

The search warrant was issued by Magistrate Roger D. McKinney upon information furnished in the following application:

"APPLICATION FOR SEARCH WARRANT

I, (Insert name and address; or, if a law officer, insert name, rank and agency) L. R. Snider, Vice Investigator, Charlotte Police Department, being duly sworn, hereby request that the court issue a warrant to search the (person) (place) (vehicle) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: Lottery tickets, papers, monies and other lottery paraphernalia (constitutes evidence of) (constitutes evidence of the identity of a

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person participating in) a crime, to wit: Dealing in Lotteries and Possession of Lottery Tickets and the property is located (in the place) (in the vehicle) (on the person) described as follows: (Unmistakably describe the building, premises, vehicle or person—or combination—to be searched.) Julian Leigh Stinson, Jr., Negro male, D.O.B. 1-30-46, 5'7" tall, weighing 160 lbs. and a 1964 Oldsmobile vehicle, red in color, North Carolina 1978 tag number FNC 538 registered to Julian Leigh Stinson, 1520 Gunn St., Charlotte, N. C.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I, L. R. Snider, on the 15 day of February 1978 executed a search warrant on Sam Clark and 3000 Barringer Dr., Charlotte, N. C. As a result of the search I seized lottery tickets and money and arrested Sam Clark and Margaret Clark for violations of the state (N.C.) lottery laws. On 14 Feb. 1978 I observed a negro male fitting the description of Julian Leigh Stinson, Jr. drive into the parking lot of the business located at 3000 Barringer Dr. in the same red Oldsmobile vehicle described above at 1020 p.m. LRS I observed the negro male go inside of the building located at 3000 Barringer Dr. and stand at an adding machine a tally up some type of white paper slips which I believe to be lottery tickets. Julian Leigh Stinson, Jr. arrived at 3000 Barringer Dr. four minutes prior to myself serving the search warrant on Sam Clark and 3000 Barringer Dr. I have received information from a confidential and reliable informant that Julian Leigh Stinson, Jr. picks up lottery tickets from lottery ticket writing houses Monday thru Friday. This informant stated to this applicant that Stinson switches vehicles very often. This informant has given me information that lead to the arrest of Emmanuel Brown for violations of the state lottery laws. Julian Leigh Stinson, Jr. has been arrested two times for lottery law violations: 4 Oct 74 & 14 Aug 75 Based on the information contained in this application (*Continue if necessary) I request that a search warrant be issued for Julian Leigh Stinson, Jr. and the 1978 Oldsmobile vehicle described above.

/s/ L. R. SNIDER

Signature of Applicant

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Sworn to and subscribed before me
this 15 day of February, 1978.

/s/ ROGER D. MCKINNEY
Magistrate"

The following property was found and seized upon search immediately after issuance by Officer Snider on the person of defendant or in his 1964 Oldsmobile at 3000 Barringer Drive:

- 2 Texas Instruments Calculators
- 1 Brown Handbag and Contents
- 1 Blue Bank Bag and Contents
- 484 Lottery Tickets
- \$229.47 in U. S. currency
- 1 Magnum Pistol
- 3 Live Bullets
- 1 Holster

Following the search defendant was arrested and warrants were issued charging defendant with (1) transporting lottery tickets, monies and lottery paraphernalia used in the operation of the numbers game known as butter, eggs and race lottery, (2) selling tickets used in the operation of a lottery, (3) carrying on a lottery, and (4) carrying a concealed weapon.

On 9 May 1978 defendant moved to quash the search warrant and suppress the evidence on grounds that the warrant was invalid and not in conformity with G.S. 15-26.

On 15 May 1978 at arraignment defendant requested a hearing on the motion to quash. The State requested a continuance because it had no witness present. Judge Griffin denied the State's motion to continue and heard the matter solely on the search warrant and application. The court ruled that the search warrant on its face did not establish probable cause and granted defendant's motion to quash.

The formal order, entered 22 May 1978, recited facts and conclusions of law to the effect that, in summary, the factual allegations in the Application were insufficient, that the allegations based on the personal observations of the affiant were conclusory rather than factual, and that the information from the confidential informant was not sufficient to show reliability.

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Attorney General Edmisten by Assistant Attorney General Joan H. Byers for the State, appellant.

Jerry W. Whitley and Kenneth W. Parsons for defendant appellee.

CLARK, Judge.

The sole question for determination by this Court is whether the trial court erred in ruling that the search warrant was invalid because the sworn affidavit did not provide the magistrate with facts and details sufficient to establish probable cause. If invalid, the Exclusionary Rule was properly invoked by the trial court to exclude as evidence at trial the fruits of the search.

The Exclusionary Rule was established in *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), as applicable to federal law enforcement officials and was made binding on the states in *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). The Rule is a court-established remedy primarily for violation of the Fourth Amendment guarantee against "unreasonable searches and seizures" and is designed to remedy police misconduct.

The Rule has been subjected to periodic criticism. Chief Justice Burger in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971), in a dissenting opinion (403 U.S. at 411-24) severely criticized the use of the Rule, stating that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials," (403 U.S. at 416) and he felt that it should be replaced by a more effective deterrent. This dissent has had a narrowing tendency. The Court has been very careful to balance the deterrent effect of the Rule's use against the cost to government and society of losing the use of probative evidence where the Rule's application is attempted in those situations other than on initial criminal trial. In *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561, 94 S.Ct. 613 (1974), the court decided that a grand jury witness could not refuse to answer questions on the grounds that they were based on evidence obtained from an unlawful search and seizure. In *United States v. Janis*, 428 U.S. 433, 49 L.Ed. 2d 1046, 96 S.Ct. 3021 (1976), it was held that the

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Rule should not be extended to forbid the use in civil proceedings by one sovereign of evidence seized by a criminal law enforcement agent of another sovereign. In *Stone v. Powell*, 428 U.S. 465, 49 L.Ed. 2d 1067, 96 S.Ct. 3037 (1976), the court held that where the state has provided an opportunity for the full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal *habeas corpus* relief on the ground that evidence obtained through unconstitutional means was introduced at trial.

Notwithstanding judicial misgivings about the effectiveness of the Rule and the denial of its application in peripheral proceedings, the use of the Rule in criminal proceedings remains as one of the fundamental safeguards against the infringement of the Bill of Rights in the American criminal law system.

A search warrant should not issue except upon probable cause—facts and circumstances sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched. 11 Strong's N.C. Index 3d, Searches and Seizures, § 20; G.S. 15A-244.

In the case *sub judice*, the affiant was L. R. Snider, Vice Investigator, Charlotte Police Department, who in his application for issuance of the search warrant relied on his personal observation of circumstances on the day before and the day of the issuance of the search warrant. The affiant also relied on information from a "reliable informant."

Where the affiant relies heavily on an informant's tip the two-prong test of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), must be met. The *first* prong of the test is that the affidavit must state sufficient underlying circumstances to permit a neutral and detached magistrate to understand how the informant reached his conclusion. The purpose of the first prong is to check the method by which the informant gathered the information, or, in the absence of a statement dealing with the method, to describe the accused's criminal activity in sufficient detail that the magistrate may know that the information is reasonably reliable. The *second* prong of the test is that the affidavit must state sufficient underlying circumstances establishing the reliability or credibility of the informant. See, *United States v. Harris*, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct.

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2075 (1971), where factors considered in determining reliability of the informant included his declaration against his penal interest, the personal interview of the informant by the agent who judged him to be prudent, and the affiant's prior personal knowledge of the accused.

In the case before us, the affidavit does not disclose the method by which the informant gathered the information, but the informant did describe the defendant's criminal activity, *i.e.*, his picking up lottery tickets from writing houses and his switching vehicles often. Is this sufficient underlying circumstance to meet the first prong of the test? The affiant knew the informant and considered him reliable, and the informant had given him information which led to the arrest of Emanuel Brown for violation of the state lottery laws. Is this sufficient underlying information of reliability to satisfy the second prong of the test? We do not find it necessary to answer these two questions because, clearly, the affiant did not rely heavily on this hearsay information, and the magistrate's finding of probable cause could not have been based primarily on the hearsay.

We find that the facts and circumstances recited by the affiant which were based on his personal observation of the defendant on the day before and the day of the search were more detailed and more reliable than the informant's tip. On 14 February 1978, Officer Snider, an experienced vice investigator, observed defendant drive his vehicle to the designated place, go inside the building, stand at an adding machine and tally some white paper slips which he believed to be lottery tickets. On the following day he observed the defendant's vehicle and someone who resembled the defendant at the same place four minutes before the officer arrested the Clarks for violation of lottery laws and seized lottery tickets and money. Officer Snider had knowledge of defendant's prior arrest record and reputation for lottery law violations. We conclude that there was sufficient data contained in the application to justify a finding of probable cause by the magistrate and his issuance of the search warrant. This data was based on the personal observation of the affiant and supported by information from a confidential informant, even though the informant's tip may not have been sufficient in itself to justify a finding of probable cause by the magistrate. In *Jones v. United States*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960), it was

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held that the finding of probable cause may be based upon hearsay evidence in whole or in part.

Many cases decided by both the North Carolina Supreme Court and Court of Appeals support the *Jones* decision. We do not consider it necessary to list these cases, but reference is made to the cases compiled in 11 Strong's N.C. Index 3d, Searches and Seizures, §§ 19-31.

We do not agree with the conclusion of the trial court that the application does no more than suggest vaguely suspicious circumstances. It is noted that at the conclusion of the trial the judge ruled that the motion to quash was allowed on the grounds that the warrant on its face did not establish probable cause, and that "the defendant could have been arrested on the spot without a search warrant and his car searched at that time if the defendant was dealing in lottery tickets." It appears that the trial judge concluded that there was probable cause for the arrest of the defendant, and a search of his person and car, when he was on the premises at the time the Clarks were arrested. If so, the statement in the application that defendant was present on the premises at the time of this arrest should be given great weight in determining that there was probable cause for the issuance of the search warrant.

This order appealed from is vacated and this cause remanded for proceedings consistent with this decision.

Vacated and remanded.

Judges MITCHELL and WEBB concur.

STATE OF NORTH CAROLINA v. JANE COOPER RHYNE

No. 789SC734

(Filed 2 January 1979)

1. Criminal Law § 42.4— connection of knife with crime

In this prosecution for felonious assault, a knife was sufficiently associated with the crime charged for its admission in evidence where the victim testified that a knife was used in the assault and that the knife offered in evidence

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could have been that knife; a codefendant's father testified he sold the knife to defendant on the date of the crimes and later found it under a kitchen cabinet; an examination of the knife by a forensic serologist revealed the presence of blood; and other testimony tended to show that holes in the clothes of the victim could have been caused by the knife.

2. Conspiracy § 6— conspiracy to murder—sufficiency of evidence

The State's evidence was sufficient for the jury on the issue of defendant's guilt of conspiracy to murder her mother and sister.

3. Assault and Battery § 14.3— felonious assault—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant assaulted her sister with a lamp and with porcelain figurines, that defendant intended to kill her sister, and that defendant's sister suffered multiple cuts of the face, two lacerations on the back of the scalp, two or three small lacerations of the right hand, and an injury to the base of the nose.

4. Assault and Battery § 15.2; Indictment and Warrant § 17.5— deadly weapon used—variance between indictment and charge—absence of prejudice

In a felonious assault prosecution in which the indictment alleged that a lamp was the deadly weapon used in the assault and the evidence showed that defendant assaulted the victim with a lamp and with porcelain figurines, defendant was not prejudiced by the court's charge which permitted the jury to find that a porcelain figurine was the deadly weapon used in the assault since the indictment itself was not defective and all the purposes of the indictment were served in this case.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 20 April 1978 in Superior Court, VANCE County. Heard in the Court of Appeals 28 November 1978.

The defendant, Jane Cooper Rhyne, was indicted for assault with a deadly weapon with intent to kill inflicting serious bodily injuries and for conspiracy to commit murder. Upon her pleas of not guilty to both charges, the jury returned verdicts of guilty as charged. From judgment sentencing her to imprisonment for a term of twenty years and a consecutive suspended term of imprisonment of ten years for the respective crimes, the defendant appealed.

The State's evidence tended to show that the defendant, Jane Cooper Rhyne, and Martha Inscoe went to the home of the defendant's mother at approximately 3:30 p.m. on 25 January 1978 to look for a key to a house the defendant and Inscoe occupied. While in the defendant's mother's home on that occasion, Inscoe

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asked her if any of the telephones in the home would work when one of them was disconnected. The defendant and Inscoe departed the home shortly thereafter but returned at approximately 10:15 p.m. Upon returning to the home, they discovered the defendant's mother and sister there alone. The defendant walked to the fireplace and asked her sister to come to her. When the defendant's sister approached, she grabbed her by the arm and threw her to the floor. Inscoe then produced a knife and told the defendant's mother not to move. The defendant's mother made an unsuccessful attempt to gain control of the knife by taking it from Inscoe and was cut on the hand. The defendant then began beating her sister with a lamp and with porcelain figurines and stated that she was going to blind her sister and kill her. The defendant called to Inscoe to kill the defendant's mother and to then help the defendant kill the sister. Inscoe then stabbed the defendant's mother several times. At that time, the wind apparently slammed the back door of the home shut, and the defendant and Inscoe fled.

Both the defendant's mother and sister were admitted to the hospital. The defendant's mother was suffering from multiple stab wounds and was in a state of shock. The defendant's sister had multiple lacerations on her face, the back of her scalp and her right hand. Both victims remained in the hospital for a week.

The defendant presented evidence in the form of alibi testimony.

Additional facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

J. Henry Banks for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission into evidence of a knife marked and identified as State's Exhibit 1. In support of this assignment, the defendant contends that the State's evidence failed to associate the knife with a crime charged. This assignment is without merit.

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Generally, weapons may be admitted into evidence when testimony or other evidence tends to show that they were used in the commission of a crime. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973). The defendant's mother testified that a knife was used in the commission of the crimes charged and that State's Exhibit 1 could have been that knife. Martha Inscocoe's father testified that he sold the knife identified as State's Exhibit 1 to the defendant on the date of the crimes charged. He later found the knife under a kitchen cabinet and turned it over to law enforcement authorities. The knife was examined by a forensic serologist employed by the State Bureau of Investigation. This examination revealed the presence of blood on the knife. Testimony was also admitted tending to show that holes in the clothes of the defendant's mother could have been caused by the knife. Any lack of certainty by the defendant's mother in identifying the knife went to the weight and credibility to be given the State's evidence rather than to its admissibility. State's Exhibit 1 was relevant evidence amply identified. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976). The trial court correctly admitted the knife into evidence.

The defendant next assigns as error the denial of her motion for judgment as in the case of nonsuit made at the close of the State's evidence. After the denial of this motion, the defendant presented evidence in her own behalf. No additional motion was made by the defendant at the close of all of the evidence. When the defendant introduced evidence, she waived her prior motion for judgment as in the case of nonsuit. G.S. 15-173; *State v. Fikes*, 270 N.C. 780, 155 S.E. 2d 277 (1967); *State v. Howell*, 261 N.C. 657, 135 S.E. 2d 625 (1964). Therefore, the defendant has established no basis upon which to appeal the denial of her motion.

However, we note that, on appeal of these cases to this Court, the defendant could have asserted the insufficiency of all of the evidence without regard to whether a motion was made at trial. G.S. 15A-1227(d); G.S. 15A-1446(d)(5). Although the defendant did not properly assert her assignment of error with regard to the sufficiency of the evidence, we choose to review it *ex mero motu*.

[2] The crime of conspiracy need not be proven through direct evidence, and only rarely will direct evidence of a conspiracy be

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available. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975); *State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536, *appeal dismissed*, 291 N.C. 325, 230 S.E. 2d 678 (1976). Generally, a conspiracy is

established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. . . . [T]he results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

State v. Whiteside, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933) (citations omitted). When taken in the light most favorable to the State, we find the evidence introduced was sufficient to sustain the defendant's conviction for conspiracy.

[3] There was also sufficient evidence from which the jury could determine that the defendant assaulted her sister with a lamp and figurines which were used as deadly weapons and that, at the time of the assault, the defendant intended to kill her sister. Whether the defendant inflicted "serious injury" by such an assault is not susceptible to answer by the application of a broad general rule. Instead, this issue must be resolved by looking to the peculiar facts of the case on appeal. *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). In the present case, a medical doctor testified that the defendant's sister suffered multiple cuts of the face, two lacerations on the back of the scalp, two or three small lacerations of the right hand and an injury to the base of the nose. We find this sufficient evidence from which the jury could determine that the defendant inflicted "serious injury" upon her sister. The State's evidence was sufficient to sustain both convictions of the defendant.

[4] The defendant contends that the trial court erred in its charge to the jury by allowing the jury to find that a figurine was the deadly weapon used by the defendant to assault her sister, and not a lamp as alleged in the bill of indictment. During its

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charge, the trial court stated that, prior to returning a verdict of guilty on the assault charge, the jury must find that the State had proven that the defendant used a deadly weapon. The trial court further stated to the jury that either a figurine or a lamp could be a deadly weapon and that the jury must find that the defendant assaulted the victim with figurines *and* a lamp before returning a verdict of guilty. It is possible, therefore, that the jury based its verdict of guilty upon finding that one of the figurines was a deadly weapon but the lamp was not and that the victim was assaulted with both the figurines and the lamp. If this conclusion was reached by the jury, and for purposes of this appeal we must assume *arguendo* that it was, the conviction was based upon the use of a deadly weapon other than that described in the bill of indictment.

There was no defect in the bill of indictment itself, as it contained all of the information required by G.S. 15A-924. Nor was there a fatal variance between the allegations of the bill and the proof offered at trial. Ample evidence was presented that the defendant committed the assault charged with a lamp used as a deadly weapon. Additionally, the trial court's charge, although varying from the precise allegations of the bill, was fully supported by the evidence. As previously pointed out, however, the trial court's charge on the evidence varied from the precise allegations of the bill of indictment.

In determining whether the variance of the trial court's charge from the precise allegations of the bill constituted prejudicial error requiring reversal, we must look to the purposes served by a bill of indictment. The first purpose of the bill is to identify the crime for which the defendant stands charged. A second purpose of the bill is to protect the defendant against being tried twice for the same offense. A third purpose of the bill is to provide a basis upon which the defendant may prepare his defense. Finally, the bill guides the trial court in the imposition of sentence upon a determination of the defendant's guilt. *State v. Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974); *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953).

In the present case the bill of indictment has served each and every one of these purposes. The bill serves the first purpose by identifying the crime for which the defendant was charged as

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assault with a deadly weapon with intent to kill inflicting serious bodily injuries not resulting in death. The bill serves the second purpose of a bill of indictment by protecting the defendant from being twice put in jeopardy for the same offense. The evidence clearly demonstrated that a single assault was committed, even though two or more weapons may have been used in that assault. The assault was committed at a single time and place and against a single victim. An additional conviction based on the same evidence would be prohibited by the defendant's assertion of her right to be free from being twice put in jeopardy for the same offense. *See Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970). As the bill of indictment provided an ample basis for the defendant's preparation of her defense, the third purpose of a bill of indictment was served. This is particularly true in light of the fact that she offered evidence tending to establish alibi. A more complete description of the weapon or weapons used would not have materially improved her ability to prepare her defense as both the lamp and figurines were similar blunt instruments employed at the same time and in an identical manner. Obviously, a more detailed description of the weapon or weapons used would not have related to the defendant's assertions of alibi. We do not believe that the portion of the trial court's charge describing the weapons as a lamp and figurines could have caused any surprise on the part of the defendant which would necessitate a different defense or would have affected the credibility of the defense she presented. The final purpose of a bill also was clearly served as the crime charged was sufficiently identified to enable the trial court to impose a sentence within the limits established by law.

As the bill of indictment was not defective and the purposes of a bill of indictment were served, we perceive no prejudicial error in the trial court's charge to the jury, even though there was a technical variance between the charge on the evidence and the precise wording of the bill. As any error in the charge was not prejudicial, a new trial will not be required, and the assignment of error is overruled. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); 1 Strong's N.C. Index 3d, Appeal and Error, §§ 46.1 and 47, pp. 302-305.

The defendant additionally assigns as error the trial court's statement of her contentions. The defendant contended that she

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talked to one Dwain Tart at 9:40 p.m., but the trial court stated that she contended she talked with him until 9:40 p.m. The defendant failed to object to the statement of contentions before the jury retired and, thereby, waived her right to appeal any error in this regard. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978).

The defendant received a fair trial free from any prejudicial error, and we find

No error.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. MARTHA ANN INSCOE

No. 789SC735

(Filed 2 January 1979)

Criminal Law §§ 145, 154— consolidated trial of defendant—two records on appeal—taxing of costs against attorney

Where an attorney representing two defendants in an appeal from a consolidated trial caused two separate records on appeal to be filed in the appellate court when only one was required by App. R. 11(d), the attorney will be taxed with a portion of the costs. App. R. 9(b)(5).

APPEAL by defendant from *Thornburg, Judge*. Judgments entered 20 April 1978 in Superior Court, VANCE County. Heard in the Court of Appeals 5 December 1978.

In Case No. 78CRS427 defendant, Martha Ann Inscoe, was indicted for assault upon Florine Cooper with a deadly weapon, to wit: a knife, with intent to kill inflicting serious injuries. In Case No. 78CRS1775 defendant, Martha Ann Inscoe, was indicted for conspiring with one Jane Cooper Rhyne to murder Florine Cooper and Nancy Parham Cooper. Defendant Inscoe pled not guilty to both charges.

By separate indictments, Jane Cooper Rhyne was charged with assault with a deadly weapon with intent to kill inflicting serious injuries upon Nancy Parham Cooper and with conspiring with Martha Ann Inscoe to murder Florine Cooper and Nancy

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Parham Cooper. Jane Cooper Rhyne pled not guilty to those charges.

All charges against both defendants were consolidated for purposes of trial. The jury found each defendant guilty as charged. From judgments sentencing her to prison for a term of twenty years in Case No. 78CRS427 and for a consecutive suspended term of ten years in Case No. 78CRS1775, defendant Martha Ann Inscoe appeals.

Attorney General Edmisten by Assistant Attorney General Jo Anne Sanford for the State.

J. Henry Banks for defendant appellant.

PARKER, Judge.

This is an appeal by the defendant, Martha Ann Inscoe, from the same trial at which her co-defendant, Jane Cooper Rhyne, was also found guilty. Both defendants appealed. Both were represented at trial by the same attorney, who also represents each of the defendants upon their separate appeals to this Court. The attorney caused two separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), North Carolina Rules of Appellate Procedure; *State v. Kessack*, 32 N.C. App. 536, 232 S.E. 2d 859 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976); *State v. McKenzie*, 30 N.C. App. 64, 226 S.E. 2d 385 (1976). The filing of two records when there should have been but one has placed an unnecessary burden on this Court. Pursuant to Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure, defendant's counsel will be personally taxed with a portion of the costs in this case in the sum of \$79.55. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Bryson*, 30 N.C. App. 71, 226 S.E. 2d 392 (1976); *State v. Ashe*, 30 N.C. App. 74, 226 S.E. 2d 398 (1976); *State v. Cottingham, supra*; *State v. McKenzie, supra*.

The brief filed by the attorney for the defendant in this case is identical with the brief which he filed in connection with the appeal of the co-defendant, Jane Cooper Rhyne, and defendant in this case seeks to raise the same questions for appellate review as are presented by the appeal of the co-defendant even though

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not all of the questions raised by the appeal of the co-defendant are applicable to the case of this defendant. By opinion filed simultaneously herewith the panel of this Court which passed upon the appeal of the co-defendant, Jane Cooper Rhyne, has found no error in the trial. *State v. Rhyne*, 39 N.C. App. 319, 250 S.E. 2d 102 (1979). For the reasons stated in the opinion in that case, we find no error in the trial of the charges against the defendant, Martha Ann Inscoe. There was ample evidence to require submission of the charges against defendant Inscoe to the jury.

In the trial of the defendant Inscoe and in the judgments from which she has appealed, we find

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.), concur.

STATE OF NORTH CAROLINA v. RAY BAGLEY

No. 7827SC708

(Filed 2 January 1979)

1. Criminal Law § 34.6—evidence of other offenses—admissibility to show intent

In a prosecution for possession of heroin with intent to sell, testimony by a witness that she had bought heroin from defendant 75 to 100 times in the past was properly admitted to show intent.

2. Criminal Law § 162.4—objection to answer—motion to strike—failure to specify objectionable portions

Though it was incorrect for the trial judge to deny defendant's motion to strike merely because defendant did not object to the question, defendant was not prejudiced by the admission of the evidence since part of the evidence was incompetent but defendant failed to indicate which portions he wished to have stricken, as he was required to do.

3. Criminal Law § 60—fingerprint evidence unavailable—testimony of nonexpert admissible

Defendant's contention that it was improper to admit an officer's testimony that fingerprints could not be obtained from a tinfoil packet allegedly containing heroin because the officer had not been qualified as an expert is without merit.

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4. Criminal Law § 24— refusal to plea bargain—proper reasons for stiff sentence

The evidence did not reveal that defendant was given a greater sentence because he did not enter into a plea bargain where the statements allegedly made by the trial court about his willingness to give defendant a lighter sentence if he plea bargained were made before all the evidence had been heard, and the record supported the court's finding that defendant was not a "casual pusher of heroin" but that he was a substantial dealer.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 16 December 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 15 November 1978.

Defendant was indicted for selling heroin and for possessing heroin with intent to sell. The State presented evidence that Patricia Stowe arranged with the police to set up defendant "to be busted." On 17 May 1977 Stowe met defendant at Gina Dunlap's apartment and gave him \$500 in exchange for a tinfoil packet of heroin. She testified over objection that prior to that date she had purchased heroin from defendant at least 75 to 100 times. She had known defendant for three or four years.

V. L. Furr, a special agent with the SBI, testified that he arrested defendant on 17 May, and that after executing a waiver of rights defendant made a statement admitting selling drugs to Stowe.

Defendant testified that he met Stowe at Gina Dunlap's apartment on 17 May but did not sell her any heroin. He denied making a statement to Furr that he had sold Stowe heroin. He had known Stowe for four or five years, and had never sold heroin to her. A number of spectators in the courtroom were asked individually to stand, and defendant denied having sold heroin to any of them.

On rebuttal Patricia Stowe testified that her telephone conversations with defendant on the day of the heroin purchase had been recorded by the police and transcribed. The tape and transcript were admitted into evidence over objection, and the tape was played for the jury.

Defendant was found guilty on both counts and sentenced to ten years and five years to run consecutively. He appeals.

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Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Chip Cloninger for defendant appellant.

ARNOLD, Judge.

I.

[1] Defendant first contends that the trial court erred in admitting Stowe's testimony that she had bought heroin from him 75 to 100 times in the past. Evidence of prior crimes is inadmissible to show a defendant's disposition to commit a crime. *State v. Little*, 27 N.C. App. 211, 218 S.E. 2d 486 (1975); 4 Strong's N.C. Index 3d, Criminal Law § 34.1. The general rule is that evidence of another offense is inadmissible even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). "Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable." *Id.* at 176, 81 S.E. 2d at 368. The well-established exceptions to the rule stem from the test of logical relevancy. If the challenged evidence "reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Id.* at 177, 81 S.E. 2d at 368. Among the exceptions set out in *McClain* is the "intent" exception, which we find applies here: "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." *Id.* at 175, 81 S.E. 2d at 366.

Although defendant was indicted and tried for both selling heroin and possession with intent to sell under G.S. 90-95(a)(1), he relies on *State v. Choate*, 228 N.C. 491, 46 S.E. 2d 476 (1948), to support his argument that intent was not in issue here. *Choate* was a prosecution for abortion, and the challenged evidence was the testimony of other women that the defendant had performed abortions on them. Defendant denied having performed any abor-

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tions at all. The court indicated that where the defendant did not admit that he committed the act and try to justify it, but instead denied committing it, it was improper to admit the challenged evidence to show intent, as intent was not in issue. *Choate* differs from the case before us, however, in that abortion is a general intent crime, in which intent is not an essential element. A charge of possession of heroin with intent to sell obviously requires that intent be proved. Defendant's argument is that, since the charge of possession here arose from the selling incident, testimony of the sale carried with it the presumption of intent to sell, making it necessary for the State to prove only that defendant possessed the heroin when he sold it. Even accepting this analysis as true, the evidence of prior sales as showing intent was properly admitted. As the court pointed out in *State v. Simons*, 178 N.C. 679, 100 S.E. 239 (1919), even if the jury found in accordance with the presumption of intent, the challenged evidence was, at the most, unnecessary but not incompetent. The *McClain* intent exception does not require that to be admissible the evidence be the only available proof of intent, but merely that it "tend to establish" the requisite intent. We note that the challenged evidence was admissible only with regard to the charge of possession with intent to sell and not to the charge of selling; however, the limiting instruction given in the charge to the jury was more than adequate. This assignment of error is without merit.

II.

Defendant also assigns error to the admission of two portions of the testimony of Officer Bryant. After the heroin buy, Bryant received a tinfoil packet from the officer who had accompanied Stowe to make the buy. Bryant testified that he wrote his initials, the time and date on the packet when he received it, then returned to the office, put the packet into an envelope and wrote on the envelope. During direct examination the following then occurred:

Q. And what is that writing, please?

A. In my own handwriting, it says, "Purchased from Ray Bagley at 4:20 p.m., 5/17/77, at an apartment on North Weldon Street, Gastonia, by Patricia Wylie Stowe, handed to Sherrie Harmon by Patricia Stowe on Weldon Street at 4:25 p.m., 5/17/77, given to Detective Bryant by Sherrie Harmon

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at 4:35 p.m., 5/17/77, in Room 136 at the Ramada Inn, Gastonia."

MR. PUETT: Now, Your Honor, we would MOVE TO STRIKE that portion.

COURT: You did not object. MOTION TO STRIKE IS DENIED.

MR. PUETT: The question was competent, Your Honor. I'm just moving to strike that portion that is incompetent.

COURT: He said that's what he wrote there.

MR. PUETT: Yeah, but that—part of that is competent.

COURT: Well, you did not object to the question. MOTION IS OVERRULED.

Defendant argues that his motion to strike was improperly denied because portions of the answer were hearsay.

[2] We note first that it was incorrect for the judge to deny defendant's motion to strike merely because defendant did not object to the question. As defense counsel points out in the record, the question itself was not objectionable, and "when inadmissibility is not indicated by the question and becomes apparent in the answer . . . , the objection should be in the form of a motion to strike the answer or its objectionable part." 4 Strong's N.C. Index 3d, Criminal Law § 162.3 at 829.

We are not persuaded by the State's argument that the writing on the envelope was admissible evidence under the "official records" exception to the hearsay rule. See generally 1 Stansbury's N.C. Evidence § 153 (Brandis rev. 1973). Portions of the writing clearly were not "within the personal knowledge of [Officer Bryant]," *id.* at 513, and constituted inadmissible hearsay. We find, however, that defendant failed to indicate which portions of the answer he wished to have stricken, as he is required to do. There is no error in the overruling of a general objection where the evidence is competent for any purpose. 4 Strong's N.C. Index 3d, *supra*.

[3] Nor do we see merit in defendant's argument that it was improper to admit Bryant's testimony that fingerprints could not be obtained from the tinfoil, since Bryant had not been qualified as

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an expert. Our statement in the case of *State v. Mitchell*, 6 N.C. App. 755, 757, 171 S.E. 2d 74, 76 (1969), applies equally here: "[Defendant] could not be prejudiced by the lack of evidence against [him] implicit in the State's admission that no fingerprints had been taken"

III.

[4] Before the State presented rebuttal evidence defendant moved for a mistrial, partially upon the ground that on the preceding day, according to defense counsel, the trial judge had commented to him "that I could come out here and tell my client to plead guilty and take ten years and that I might could save him some time." The court responded:

COURT: All right, Mr. Puett, that MOTION IS DENIED; and you can take it up. You have a habit of coming to judges and talking about your cases; and I don't like it; and I told you I would not go along with a plea bargain of three to five years; that if he wanted to plead guilty, I would agree that it be ten years; and don't you ever come into my chambers again. Do you understand?

After the verdict was returned, the defendant was sentenced to a total of 15 years.

In the case at bar the record is sufficiently different from *State v. Boone*, 33 N.C. App. 378, 235 S.E. 2d 74 (1977), relied upon by defendant to support his contention that the trial court imposed a greater sentence because he did not enter into a plea bargain, to distinguish the two cases. We see no basis for defendant's contention.

Unlike *Boone*, *supra*, the record here is devoid of any reasonable inference that defendant was penalized for pleading not guilty. Suffice to say, the record does reveal, from the statement by counsel for defendant, that the purported statements made by the trial court were "made prior to the time that all of the evidence was heard." Furthermore, the record is supportive of the trial court's finding that "from the evidence in this case . . . [defendant] is not a casual pusher of heroin, that he is a substantial dealer with connections to obtain a very high quality heroin and rather substantial quantities on short notice."

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Having reviewed all defendant's other assignments of error we find that defendant received a fair trial, without prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES ANDREW LAMB, JR.

No. 7822SC747

(Filed 2 January 1979)

1. Constitutional Law § 50— speedy trial—exclusion of testimony—harmless error

In a hearing on a motion to dismiss for lack of a speedy trial, defendant was not prejudiced by the exclusion of a witness's testimony as to the number of criminal cases pending in the county on certain dates where the record from which the witness would have testified was accepted into evidence.

2. Constitutional Law § 50— speedy trial—delay between first and second trials—neglect by State—absence of prejudice

Defendant's right to a speedy trial was not denied by a delay of over 19 months between the time defendant was granted a new trial by the Court of Appeals and his retrial, although the length of the delay and testimony by the clerk of court that a number of more recent cases were calendared ahead of defendant's case showed neglect on the part of the State, where defendant was free on bond during the period between his first and second trials, the delay caused defendant no excessive anxiety or concern, the delay did not impair defendant's defense, and defendant at no time made a demand for a trial of the case.

3. Criminal Law § 89.10— impeachment—specific acts of misconduct—absence of prejudice

In this prosecution for discharging a firearm into an occupied dwelling, testimony by an occupant of the dwelling that a defense witness pointed a gun at her later in the same morning as the incident in question, if incompetent as an attempt to impeach the witness by evidence of a specific act of misconduct, was not prejudicial to defendant since the witness testified that he, not defendant, shot into the dwelling, and the occupant's testimony tended to support rather than impeach his testimony.

4. Criminal Law § 119— request for instructions—oral request not sufficient

The trial court did not err in failing to give an instruction on prior inconsistent statements as orally requested by defendant, since the allowance of re-

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quests for special instructions not submitted in writing before the charge begins rests in the judge's discretion. G.S. 1-181.

APPEAL by defendant from *Mills, Judge*. Judgment entered 21 March 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 29 November 1978.

Van Byars swore out a complaint against the defendant for discharging a shotgun into Byars' house on 24 June 1975 while it was occupied. Defendant was convicted and judgment was entered on 30 October 1975; on 21 July 1976 this Court granted defendant a new trial. *State v. Lamb*, 30 N.C. App. 255, 226 S.E. 2d 680 (1976). The second trial was not begun until 20 March 1978, at which time defendant moved to dismiss on the ground that he had been denied a speedy trial. A hearing was held on the motion and the motion was denied.

It was stipulated that at the time of the shooting Mr. & Mrs. Byars and their children were occupying the Byars house. The State presented evidence that on the night of 24 June 1975 the Byars family was asleep when something awakened Mrs. Byars. She went to the window and saw defendant standing outside with a shotgun in his hand. She testified that she had known defendant 20 years as he was her husband's nephew, and that she saw him about every day. She called for her husband and defendant ran. About that time a police car pulled up in the driveway; Mrs. Byars told the officer that defendant had gone running out of the driveway. At that time she did not know that there had been any shooting. The police examined the house and found holes in the window screen and the inside wall. They recovered some shotgun pellets. Thirty minutes to an hour after the police left, defendant and Jim Lamb and another man pulled up in a car, and defendant called "I shot through your house. Come on out here and I will shoot you now."

Deputy Mullis testified that he talked to Mrs. Byars after the shooting and that she described the clothing the man was wearing, but she could not swear that defendant was the man. He said he asked her two, three or four times if she could identify the person she saw running up the road, and she did not say that that person was the defendant, although she said it looked like him.

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The defense called Jim Lamb, who testified that it was he who shot into the Byars house. He did it because of something Mr. Byars said when defendant's father was shot. He was not present at any later conversation between defendant and Mr. Byars.

Sergeant Hampton of the Lexington Police Department testified that in the morning after the shooting Mrs. Byars came to the police station to see about obtaining a warrant. She said the man she saw outside her house had something in his hand but she couldn't tell what it was, and that the man looked like the defendant, but she could not be sure.

Mrs. Byars, recalled by the State, testified that she did not have a conversation with Officer Hampton on 24 June, and that she had gone to the police station that day not about the defendant, but to swear out a warrant against Jim Lamb for pointing a gun at her and her son later on the morning of the shooting.

Defendant was found guilty and sentenced to four to six years. He appeals.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Barnes & Grimes, by Jerry B. Grimes, for defendant appellant.

ARNOLD, Judge.

I.

[1] Defendant first contends that the court erred in excluding testimony of Rudy Puryear, manager of the Systems Division in the Administrative Office of the Courts, at the hearing on the motion to dismiss. Defendant wished to have Puryear testify to the number of criminal cases pending in Davidson County Superior Court on 1 January 1977 and 1 January 1978, but the State objected on the ground the testimony was hearsay, since Puryear had no first-hand knowledge of the information. We find that defendant was not prejudiced by the exclusion of the testimony, since the record from which Puryear would have testified was accepted into evidence, and Hugh Shepherd, Clerk of the Superior Court of Davidson County, was permitted to testify at length

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about the backlog of criminal cases pending in Davidson County. There is no showing that any information that would have been beneficial to defendant was excluded.

II.

[2] Defendant next argues that his motion to dismiss for failure to provide a speedy trial should have been granted. The defendant was granted a new trial by this Court in an opinion received by the Clerk of Superior Court of Davidson County on 12 August 1976. The case was not called for trial until 20 March 1978, 19 months and 8 days later.

In *State v. Tindall*, 294 N.C. 689, 242 S.E. 2d 806 (1978), there are set out four interrelated factors which are of primary significance in determining whether a defendant has been denied his right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant has asserted his right, and (4) the prejudice to defendant by the delay. None of the factors alone is determinative; they must be considered together.

The delay here was a long one, and such delays are certainly disapproved. See *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965). However, under the law existing at the time of this trial the circumstances of each case must be examined to determine whether a speedy trial has been denied. Moreover, the burden is on the accused to show that the delay was caused by the neglect or wilfulness of the prosecution. *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975); *State v. Hice*, 34 N.C. App. 468, 238 S.E. 2d 619 (1977).

We believe that the lengthy delay itself, coupled with the testimony of the Clerk of Court that a number of more recent cases were calendared ahead of defendant's, gives rise to a reasonable inference of neglect on the part of the State, but the defense still must show some prejudice by the delay. The trial court found that the defendant has been free on bond during the entire period between the first and second trials, that the delay has not caused the defendant any excessive anxiety or concern, and that the delay has not impaired his defense. The defendant has not shown us that any of these findings is incorrect. Finally, it is stipulated that defendant at no time made a demand for a trial of this action. While failure to demand a speedy trial does

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not waive that right, *State v. Hill, supra*, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker v. Wingo*, 407 U.S. 514, 532, 33 L.Ed. 2d 101, 118, 92 S.Ct. 2182, 2193 (1972). Considering all factors, including the conduct of both the defendant and the prosecution, we find that defendant's right to a speedy trial was not denied.

III.

[3] The defendant contends that the trial court erred in admitting the portion of Mrs. Byars' testimony explaining why she came to the police station the morning after the shooting. The challenged portion of the testimony was as follows:

MR. FULLER: Why did you come to the Sheriff's Department that morning of June 24, 1975?

A. To take out a warrant for Jim Lamb.

* * * *

MR. FULLER: Did you in fact take a warrant out against Jim Lamb?

A. I did.

* * * *

MR. FULLER: For what?

A. Pointing a gun at me and my son.

MR. FULLER: To your knowledge, was Jim Lamb in fact convicted of pointing a gun at you and your son?

* * * *

A. He plead guilty to it.

MR. FULLER: What?

A. He plead guilty to it.

* * * *

MR. FULLER: You say he pleaded guilty?

A. Yes, sir.

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MR. FULLER: When did this incident involving Jim Lamb pointing a gun take place?

* * * *

A. After Andy and them left from up at the store my husband told me to come down here and see what could be done and come tell me. When I got in the car to leave, my son was with me. Jim Lamb and Calvin and Jim's mother come running out—

* * * *

A. Jim came running out in the driveway, said "You ain't going nowhere."

Defendant argues that this testimony was inadmissible as an attempt to impeach defense witness Jim Lamb by evidence of a specific act of misconduct. While we agree that the admission of this testimony may have been in error, we cannot find that it was prejudicial error. Jim Lamb testified for the defense that it was he who shot into the Byars house. We believe that testimony that he later in the morning pointed a gun at Mrs. Byars and her son would have been unlikely to detract from or impeach his testimony, but rather would tend to support the defendant's theory that it was Jim Lamb who did the shooting.

IV.

[4] The defendant contends that the trial court erred in failing to charge the jury with regard to prior inconsistent statements of Mrs. Byars. At the close of his charge to the jury the judge asked "Anything else?" and defense counsel approached the bench and requested instructions on the prior inconsistent statements. The request was refused. Defense counsel then offered to draw up the special instruction and the court answered "All right," but apparently this was never done. G.S. 1-181 provides that requests for special instructions must be in writing and must be submitted to the judge before his charge to the jury is begun. Requests submitted at any other time are considered at the judge's discretion. Since defense counsel did not submit the requested instruction either before the jury charge, or after the charge when the judge apparently gave him permission to do so, defendant cannot now complain that no instruction on the subject was given. We note, in

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addition, that the judge in summarizing the evidence did bring to the jury's attention the inconsistencies in Mrs. Byars' statements.

V.

We have examined defendant's other assignments of error and find that they are without merit.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MAY FRANCES SPINKS

No. 7818SC880

(Filed 2 January 1979)

Homicide § 27.2— involuntary manslaughter—jury instruction negating self-defense—error

In a prosecution for second degree murder, the trial court's instruction on involuntary manslaughter that "the defendant's act was unlawful in the use of a deadly weapon" tended to take from the jury the opportunity to decide whether defendant's pointing of the gun was justified and thus negated self-defense.

APPEAL by defendant from *Crissman, Judge*. Judgment entered 26 April 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 December 1978.

Defendant was indicted for second degree murder in the death of James Russell Grimes, who was found shot on the evening of 2 May 1977. The State presented evidence that later that evening defendant made a statement to the police that she and Mr. Grimes had been in an argument that evening and he had slapped her. When he left, she went next door and called the police. She returned home, and when she saw Grimes coming back she hid, taking her .22 caliber pistol with her. Grimes started turning over furniture and tearing down pictures. When he left again defendant gathered together her five children and tried to leave in her car, but it would not start. She got out of the car and saw Grimes coming toward her. He stopped six or seven feet

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away and she asked him, "Why did you tear up my house?" He replied, "God damn it, I meant to do it." Grimes then started running toward her. Defendant pulled the pistol out of her pocket-book, started running toward her apartment, and fired the gun behind her one or two times. She did not know she had hit him until she saw through the window that a crowd was gathering around him.

Officers at the scene testified that the living room of defendant's apartment was messed up and furniture was turned over. A small caliber pistol and two spent cartridges were found behind the chair in which defendant was sitting when the police arrived. Fourteen rounds of live .22 ammunition, a pair of wire-cutters, and a can of beer were found in the pockets of the deceased.

Officer Travis of the Greensboro Police Department took defendant to the police station for questioning. He testified that on the way he asked her no questions and did not talk to her except to answer two questions she asked; that "she made the statement that she did not care if he was dead; that he had beat on her for the last time. She stated that she didn't care if she had to serve a thousand years; she was glad." At the police station defendant told Officer Travis that Grimes had been her boyfriend for seven and a half years and was the father of her youngest child. She made essentially the same statement that she had made to Officer League earlier in the evening.

Defendant's testimony about the events on the day of the shooting was essentially the same as the statements she had given to the police. She testified that when Grimes came toward her after her car wouldn't start "I told him the police were coming. And he told me he was going to kill me. And he said, 'I told you if you put me in jail again I am going to kill you.' And he started running on me. And I said, 'Billy, please don't hurt me. Please leave me alone.'" She testified that in April of 1977 he had threatened to kill her, and that in January of 1976 he had come looking for her with a shotgun because she was late getting home from school. In October of 1976 they had a fight and Grimes tried to cut her with a knife.

Lula May Corley testified as to defendant's good reputation in the community. She was called to come to the police station after defendant was taken there on the night of the shooting.

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Defendant said to her, "I killed Billy, but I didn't mean to do it." Elizabeth Williamson, defendant's neighbor, testified that she saw Grimes coming across the yard toward defendant, saying "I am going to kill you."

Ersula Lee, defendant's aunt, testified to the January 1976 incident when Grimes came after defendant with a shotgun and threatened to kill her. Defendant's face and arms and back were all scratched up that day. Marion Spinks, defendant's mother, testified about the incident in October 1976 when Grimes threatened defendant with a knife. She got him to give the knife to her, and he told her "[I]f it hadn't been for you, I'd have . . . killed her." Thomas Riggins also testified that in October 1976 he saw Grimes put a knife to defendant's throat and say he was going to kill her.

George Spinks, defendant's brother, testified that he was riding with Grimes in a car on the day of the shooting, and that Grimes, on the way to defendant's house, kept saying "I am going to get that ass," referring to defendant. Dorothy Sligh testified that she had been present at a fight between Grimes and the defendant, and that Grimes had threatened to kill anyone who called the police. She knew Grimes' reputation in the community as a dangerous and violent fighting man.

The defendant was convicted of involuntary manslaughter and sentenced to 10 years. She appeals.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Anne B. Lupton for defendant appellant.

ARNOLD, Judge.

The defendant assigns error to the judge's charge on involuntary manslaughter, arguing that the effect of the charge was to direct the jury to find her guilty of involuntary manslaughter. After instructing the jury on second-degree murder, voluntary manslaughter, and self-defense, the judge charged:

If you do not find the defendant guilty of second degree murder or voluntary manslaughter, you would then consider whether or not she would be guilty of involuntary manslaughter.

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Now, involuntary manslaughter is the unintentional killing of a human being by an unlawful act, not amounting to a felony, or by an act done in a criminally negligent way.

The defendant's act was unlawful in the use of a deadly weapon.

The jury, after some deliberation, returned to the courtroom to ask the judge for "a further definition of two of the verdicts." The judge again instructed them on all four possible verdicts, concluding with regard to involuntary manslaughter: "the State must prove . . . beyond a reasonable doubt . . . that the defendant acted unlawfully or in a criminally negligent way in this shooting. I described to you that the use of a gun in this manner would be an unlawful act. . . ."

The judge correctly charged the jury on the elements of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of another by (1) an unlawful act not amounting to a felony or (2) a lawful act done in a culpably negligent manner. 6 Strong's N.C. Index 3d, Homicide § 6.1. We are concerned with the jury charge in this case only as it relates to the first alternative, that is, an unintentional killing resulting from an unlawful act. The State argues that the charge was proper, since G.S. 14-34 makes pointing a gun at any person an unlawful act. However, our courts have long recognized that the strict language of the statute is subject to the qualification that an intentional pointing of a gun violates the statute only if it is done without legal justification. *Lowe v. Dept. of Motor Vehicles*, 244 N.C. 353, 93 S.E. 2d 448 (1956); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566 (1908). In this case, then, if the jury found that the defendant acted in self-defense they could not have found her guilty of involuntary manslaughter under the first alternative. The effect of the judge's instruction that "[t]he defendant's act was unlawful" tended to take from the jury the opportunity to decide whether defendant's pointing of the gun was justified. This is prejudicial error. A number of cases have held peremptory instructions in criminal cases improper, e.g. *State v. Godwin*, 227 N.C. 449, 42 S.E. 2d 617 (1947); *State v. Lawson*, 209 N.C. 59, 182 S.E. 692 (1935), and while the instructions in those cases were more overtly peremptory than the one here, we find that the effect is the same.

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The State argues that *State v. Walker*, 34 N.C. App. 485, 238 S.E. 2d 666 (1977), *cert. den.* 294 N.C. 445, 241 S.E. 2d 847 (1978), should control our decision here. In that case the trial court had instructed the jury:

If you do not find the defendant guilty of second degree murder or voluntary manslaughter but the state has proven beyond a reasonable doubt that he did not act in self-defense, then you must determine whether the defendant is guilty of involuntary manslaughter.

and this Court said:

The jury, when it considered the crime of involuntary manslaughter, had rejected self-defense. Since defendant was not acting in self-defense, he was acting unlawfully in pointing the gun close to Shores and firing it for the purpose of scaring him, as his testimony tends to show.

Id. at 487, 238 S.E. 2d at 667.

While the court, in the case *sub judice*, did instruct the jury that a killing would be excused on the ground of self-defense we cannot say that the jury had already rejected self-defense at the time it considered involuntary manslaughter. It appears that the subsequent instruction that "the use of the gun in this manner would be an unlawful act" negated self-defense, especially as it related to whether the shooting was an unlawful act upon which to find defendant guilty of involuntary manslaughter.

It is not necessary to discuss the remaining assignments of error since they are unlikely to recur at a new trial, which must be granted for error in instructing the jury that "the defendant's act was unlawful."

New trial.

Judges VAUGHN and MARTIN (Robert M.) concur.

In re Robinson

IN THE MATTER OF THE RIGHT TO PRACTICE LAW OF: HAROLD ROBINSON, ESQ.

No 7725SC732

(Filed 2 January 1979)

Attorneys at Law § 12— failure to perfect criminal appeals—suspension of privilege to practice law

The privilege of an attorney to practice law in the appellate courts is suspended for 12 months and his privilege to practice in criminal cases in the superior and district courts is suspended for 6 months because of his violation of D. R. 6-101(A) of the Code of Professional Responsibility where the attorney failed to perfect an appeal in each of four criminal cases in which he was appointed to represent the defendant on appeal, the attorney had never previously appeared as counsel in any appeal, and the attorney failed through study and investigation or by seeking the assistance of other attorneys adequately to prepare himself to handle the legal matters which his appointment as counsel in the four cases entailed.

THE above-styled cause was reheard in this Court on 5 December 1978 upon Order of this Court. The cause was originally heard upon appeal on 1 June 1978. An interlocutory opinion was filed 29 August 1978 (reported in 37 N.C. App. 671, 247 S.E. 2d 241 (1978)) wherein the undisputed facts of record were recited; an opinion on the disciplinary authority of the Superior Court and the Courts of the Appellate Division over attorneys was rendered; and the Judgment portion (that portion imposing discipline upon respondent) of Judge Snepp's "Memorandum Opinion and Judgment" was vacated for the causes stated; and the cause was retained for further hearing in this Court for consideration of what discipline, if any, should be imposed upon respondent for his conduct as disclosed by the record before this Court. New briefs were filed by respondent and by the State, and counsel were heard in oral argument upon the rehearing on 5 December 1978.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Smith, Moore, Smith, Schell & Hunter, by James A. Medford, and Frank J. Sizemore III, for respondent.

PARKER, Judge.

The recitation of the undisputed facts of record as set out in the interlocutory opinion of this Court filed 29 August 1978

In re Robinson

(reported in 37 N.C. App. 671, 247 S.E. 2d 241 (1978)) was as follows:

Respondent is licensed to practice law in North Carolina and in all the Courts of this State. He graduated from Wake Forest Law School in 1965 and passed the North Carolina Bar Examination in 1965. He thereafter practiced law in Mooresville, N. C. for approximately three months after which he served two years as a legal clerk in the office of the Judge Advocate General, Seventh Division of the Eighth Army. After release from active military duty in December 1967 respondent served for one year as a prosecutor in the Domestic Relations Court in Greensboro, N. C. About February 1969 respondent moved to Jacksonville, N. C. where he engaged in the general practice of law until January 1975. In June 1975 respondent moved to Morganton, Burke County, where he set up practice as a sole practitioner and has engaged in the practice of law since that time. During his ten or more years in the practice of law in North Carolina, respondent has never perfected an appeal to either court of the appellate division of this State.

In Burke County Case No. 74CR9136, *State v. Harvey Berry*, the defendant was found guilty of involuntary manslaughter on November 20, 1975 and sentenced to a term of 7-10 years in the State's prison. He gave notice of appeal. On March 2, 1976 the defendant's trial attorney petitioned the court to be permitted to withdraw as counsel and the court appointed respondent, Harold Robinson, as defendant's attorney to perfect the appeal. From March 2, 1976 to February 1977 no action was taken to obtain an order for transcript of trial and no action was taken to perfect the appeal. On February 21, 1977 the district attorney filed a motion to dismiss the appeal. On March 14, 1977 respondent filed a petition for writ of certiorari in the Court of Appeals and the writ was issued by the Court of Appeals April 7, 1977. On April 18, 1977 Judge Lewis ordered a transcript of the trial to be prepared at State expense. On May 11, 1977 the court relieved respondent of further duties in the case and appointed other counsel to perfect the appeal.

In Burke County Case No. 76CR3480, *State v. Loys Randall Ray*, the respondent was appointed on April 20, 1976 to represent the defendant on an armed robbery charge. On September 16, 1976 the defendant was found guilty of common law robbery and

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sentenced to 10 years in prison. He gave notice of appeal and the court appointed respondent to perfect the appeal. An order for the preparation of the transcript was entered September 30, 1976 and on November 17, 1976 respondent moved for and secured an order extending the time for serving the record on appeal for an additional 40 days. No further action was taken and on March 29, 1977 the district attorney filed a motion to dismiss. On May 2, 1977 an order for the arrest of the defendant was issued. On May 11, 1977 the court relieved respondent from any further duties in the case and appointed other counsel to pursue appellate review.

In Burke County Case No. 76CR6955, *State v. William Blane Hensley*, respondent was appointed to represent the defendant who was charged with rape. On November 10, 1976 the defendant was found guilty of first degree rape and sentenced to life imprisonment. He gave notice of appeal and respondent was appointed as his attorney to perfect the appeal. A transcript of the trial was prepared by the court reporter and delivered to respondent some time in January 1977. No further action was taken to perfect the appeal and on March 29, 1977 the district attorney filed a motion to dismiss. On May 11, 1977 the court relieved respondent of any further duties in the case and appointed other counsel to pursue appellate review.

In Burke County Case No. 76CR7000, *State v. Rex Carswell*, the defendant was charged with felonious breaking or entering and felonious larceny. He was represented by privately employed counsel who, with the permission of the court, withdrew prior to trial. On September 14, 1976 respondent was appointed to represent the defendant. On November 16, 1976 the defendant was found guilty as charged as to both counts and sentenced to 10 years imprisonment. He gave notice of appeal, and on the same day respondent was appointed counsel to perfect the appeal. A transcript of the trial was delivered to respondent on January 3, 1977. No further action was taken to perfect the appeal and on May 11, 1977 the court relieved respondent of any further duties in the case and appointed other counsel to pursue appellate review.

In addition to the foregoing undisputed facts as set out in the interlocutory opinion of this Court filed 29 August 1978, respondent's own testimony as set forth in the record reveals that he was

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fully informed of his appointment as counsel to obtain appellate review in each of the four cases listed above, that until his appointment in these cases he had never previously appeared as counsel in any appeal, and that after knowing of his appointment in these cases he continued to practice law in Morganton but neither through study and investigation nor by seeking the advice and assistance of other attorneys did he adequately prepare himself to handle the legal matters which his appointment as counsel in these four cases entailed. In explanation of his failure to perform his duties as appointed counsel to obtain appellate review in these cases, respondent testified:

The pressure of time was what caused me to be unable to complete these and the lack of appellate experience in these particular areas. That, combined with one other thing which I would like to mention. My wife had her first baby on the first day of April, which kind of dove-tailed with the deadlines on a couple of these cases. It had not been a problem pregnancy, but we had to watch it pretty carefully, and I had to share the housework and so forth, and so that did take some of my time, during that period.

The opinion concerning the authority of the Superior Court and the Courts of Appellate Division to discipline errant attorneys as set out in the interlocutory opinion of this Court (37 N.C. App. 671, 247 S.E. 2d 241 (1978)) is here reaffirmed and incorporated in this final opinion by reference without repetition.

We proceed now to the matter of appropriate discipline.

Disciplinary Rule 6-101(A) of the North Carolina State Bar Code of Professional Responsibility, 283 N.C. 783, provides:

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

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The undisputed facts in this case establish that respondent violated this rule in the manner in which he performed or failed to perform his duties as court appointed counsel to seek appellate review in each of the four cases listed above. After giving careful consideration to all mitigating circumstances disclosed by the record and as urged upon us in the brief and oral argument of counsel for respondent, we find that the serious nature of respondent's infractions of the Code of Professional Responsibility warrants imposition of the following disciplinary action by this Court. Accordingly, we now hereby order:

1. That the privilege of the respondent, Harold Robinson, to practice law in the Courts of the Appellate Division of the North Carolina General Court of Justice be and it is hereby suspended for a period of twelve (12) months from the effective date of this order.
2. That the privilege of the respondent, Harold Robinson, to practice law in criminal cases in the Superior Court Division and in the District Court Division of the North Carolina General Court of Justice be and it is hereby suspended for a period of six (6) months from the effective date of this order. If on said date respondent is attorney of record in any criminal case then pending in any court of the Superior Court Division or of the District Court Division, he shall forthwith bring this order to the attention of the presiding Judge of such court, who shall enter such orders as may be appropriate to remove respondent as attorney and to designate other counsel to appear in his stead. No judicial officer of any court of the trial divisions of the General Court of Justice shall appoint respondent to represent any criminal defendant after being notified of the terms of this order and before the expiration of the period of suspension, nor shall respondent accept any such appointment after the effective date of this order and prior to the expiration of the period of suspension.
3. This order shall become effective on the date the mandate of this Court shall issue in this case as provided in Rule 32(b) of the Rules of Appellate Procedure.

FRANK M. PARKER

Judge
For the Court

Judges HEDRICK and ERWIN concur.

Snow v. Power Co.

WILLIAM G. SNOW AND GROVEWOOD, INC. v. DUKE POWER COMPANY

No. 7817SC67

(Filed 2 January 1979)

1. Fires § 3; Electricity § 7.1— fire allegedly caused by power line—insufficient evidence of causation

Plaintiffs' evidence was insufficient to support a jury finding that a fire at plaintiffs' barn was caused by defendant power company's line which ran to the barn where it tended to show only that defendant removed the meter from a meter box on the barn several weeks before the fire, the fire started above the meter box, and the power line leading to the barn had electricity flowing through it the day after the fire, since plaintiffs' evidence failed to raise more than a speculation that the fire was electrical in origin and to negate other possible causes of the fire.

2. Negligence § 31— *res ipsa loquitur*—inapplicability to show causation

The doctrine of *res ipsa loquitur* permits only an inference of negligence and does not establish causation; therefore, it is not applicable when the cause is unknown or more than one inference can be drawn as to causation.

3. Fires § 3; Electricity § 7.1; Negligence § 31— fire damage—*res ipsa loquitur* inapplicable

The doctrine of *res ipsa loquitur* was inapplicable in an action against a power company to recover for fire damages to plaintiffs' barn allegedly caused by an electric power line leading to the barn where the cause of the fire was not established and defendant did not have exclusive control over the electrical equipment.

APPEAL by defendant from *Crissman, Judge*. Judgment entered 17 October 1977 in Superior Court, SURRY County. Heard in the Court of Appeals at Winston-Salem, on 14 November 1978.

On 24 June 1976, plaintiffs filed a complaint alleging that the defendant was negligent in that the electrical current passing from the defendant's power line to plaintiff's barn was of such strength as to bypass all fuses and other safety devices, and that the electricity burned through the lines and caused a fire which completely destroyed the barn and farming equipment stored within and nearby the barn.

At trial, plaintiffs' evidence tended to show that the power line ran from a utility pole to the front, or south side, of the barn where it was attached under the eaves. It then ran down to a box, and then further down to the meter box. This wire, the riser

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wire, was attached to the barn. Below the meter box was an outlet on the outside of the barn.

Plaintiff Snow, overseer for GroveWood, Inc., testified that he had never used any electricity at the barn or paid for any electrical service to the barn. He had never used or touched the meter and had never touched the wire leading from the meter box to the main power line. He first learned that there was power in the line the morning after the fire when some of the firemen received shocks when they touched the wire. The fire was located near where the service wire attached to the barn near the eaves. There was no fire in the lower part of the barn.

There was no stove or gas stored in the barn, but there was an electric cattle fence running along the north side of the barn. If a weed or object touched the fence, the fence would either burn it down or blow a fuse. The transformer for the electric fence was located under the shed, which was about 300 yards from the barn.

Ed Snow, plaintiff's father, testified that he saw the meter box door open after the defendant removed the meter, and that he closed the door and placed a plastic bag over it. At about 4:30 a.m. on 1 January 1976, he awoke and saw that the barn was on fire. The fire was directly above the meter box and about the size of a "big table."

Defendant's motion to dismiss at the close of plaintiffs' evidence was denied.

Larry Wright, testifying for the defendant, stated that he was an employee of Duke Power Company, and that the meter on plaintiff's barn was removed on 1 December 1975. The meter had been inactive for ninety-nine months. He could not say whether or not any power was used out of that meter.

Part of the meter inspector's job is to inspect the condition of wires, specifically the service drop and the riser wire. He did not know if anyone had inspected the premises after the meter was removed.

He testified that the riser wire—the wire leading up from the meter box which connected at the top of the barn with defendant's power line—belonged to the customer. Wires on types of buildings such as the barn are classified as general ser-

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vice, and the riser wires are installed and owned by the customer. Duke Power had maintained these classifications since at least 1965.

David G. Smith, a retired employee of Duke Power, testified that the riser wires on commercial buildings were supplied by the customers and that the defendant had no control over the riser wires. The meter box, however, is owned by the defendant. He never explained to the prior owner that the riser wire belonged to the customer.

Kent Gibson testified that he removed the meter from the meter box on 1 December 1975, and sealed the meter box. The wires connecting the meter were left in the box. There was no electrical current to the meter at that time; the current was cut off by loosening two bolts inside the meter box. The riser wire is connected to the meter box by a test block.

At the close of all the evidence, defendant moved for a directed verdict. The motion was denied. The following issues were submitted to and answered by the jury:

"1. Was the property of the plaintiffs, William G. Snow and Grovewood, Inc., damaged by the negligence of the Defendant, Duke Power Company, as alleged in the Complaint?

ANSWER: Yes.

2. What amount, if any, is the plaintiff, William G. Snow entitled to recover of the defendant, Duke Power Company?

ANSWER: \$5,000.00.

3. What amount, if any, is the plaintiff, GroveWood, Inc., entitled to recover of the defendant?

ANSWER: \$2,000.00."

The defendant then moved for judgment notwithstanding the verdict and a new trial, which motions were denied.

Tornow and Lewis by Michael J. Lewis for plaintiff appellees.

Folger and Folger by Fred Folger, Jr.; and William I. Ward, Jr. for defendant appellant.

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CLARK, Judge.

Defendant contends that the plaintiffs presented insufficient evidence of causation and of defendant's negligence to submit the issue to the jury.

Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence. See, *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920). "The cause of the fire is not required to be shown by direct and positive proof. . . . It may . . . be inferred from circumstances. . . . It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts. . . ." *Simmons v. Lumber Co.*, 174 N.C. 221, 225, 93 S.E. 736, 738 (1917). The evidence must show that the more reasonable probability is that the fire was caused by the defendant, or an instrumentality solely within his control. See, *Collins v. Furniture Co.*, 16 N.C. App. 690, 193 S.E. 2d 284 (1972). *Simmons v. Lumber Co.*, *supra*.

[1] In the case *sub judice*, plaintiffs' evidence, taken in the light most favorable to them, tends to show that the defendant removed the meter from the meter box several weeks before the fire, that the fire started above the meter box, and that the wires leading to the barn had electricity flowing through them the day after the fire.

In *Maharias v. Storage Co.*, 257 N.C. 767, 127 S.E. 2d 548 (1962), the plaintiff presented evidence that rags soaked with furniture polish were found in the room where a fire originated. The fire had spread from defendant's warehouse to plaintiff's building. The court held that the evidence of defendant's negligence was insufficient to reach the jury since the cause of the fire was "mere conjecture, surmise and speculation."

In *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E. 2d 719 (1967), a fire started in a public market, near a stove which had cracks in it. There were also combustible materials stored nearby. The court, quoting *Moore v. R.R.*, 173 N.C. 311, 92 S.E. 1 (1917), stated "[T]here must be more than bare evidence of a possibility, or even a probability, that the fire was so caused." 272 N.C. at 30, 157 S.E. 2d at 723. See, *Maguire v. R.R.*, 154 N.C. 384, 70 S.E. 737 (1911). Compare, *Rountree v. Thompson*, 226 N.C. 553, 39 S.E.

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2d 523 (1946); *Continental Insurance Co. v. Foard*, 9 N.C. App. 630, 177 S.E. 2d 431 (1970); *Mills, Inc. v. Foundry, Inc.*, 8 N.C. App. 521, 174 S.E. 2d 706, cert. denied 277 N.C. 111 (1970); with, *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735 (1925); *Stone v. Texas Co.*, supra; *Gaston v. Smith*, 22 N.C. App. 242, 206 S.E. 2d 311, cert. denied 285 N.C. 658, 207 S.E. 2d 753 (1974); *Collins v. Furniture Co.*, supra.

Under the standards set forth in *Maharias*, supra, and *Phelps*, supra, and the other cases cited above, we find that the plaintiffs' evidence fails to raise more than a speculation that the fire was electrical in origin. The plaintiffs' evidence does not negate the other possible causes of the fire.

Nor is the doctrine of *res ipsa loquitur* available to assist the plaintiffs in reaching the jury. *Res ipsa loquitur* is a rule of evidence which establishes a *prima facie* case of negligence. 58 Am. Jur. 2d, Negligence, § 474. In order for the rule to apply, three conditions must be met — "(1) that the accident was of a kind which does not ordinarily occur unless someone was negligent; (2) that the instrumentality or agency which caused the injury was in the exclusive control of the person charged with negligence, and (3) that the injury suffered must not have been due to any voluntary action or contribution on the part of the person injured." 58 Am. Jur. 2d, Negligence, § 480 at 55. See, *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251 (1929).

[2] The rule permits only an inference of *negligence*; it does not establish causation, *Downs v. Longfellow Corp.*, 351 P. 2d 999 (Okla. 1960), and is therefore not applicable when the cause is unknown or more than one inference can be drawn as to causation. See, *Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968). Therefore, the rule cannot be utilized to supply proof of the cause of the fire.

[3] Even if we assume, *arguendo*, that the fire was electrical in origin, *res ipsa loquitur* does not apply when the plaintiff cannot establish that the instrumentality causing the damage was in the exclusive control of the defendant. Annot., 169 A.L.R. 953 (1947). Here the defendant did not possess sole control over the wiring. The plaintiff's father testified that he had tampered with the meter box, and the defendant's witnesses testified that the riser wire belonged to and was supplied by the customer. Therefore,

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the doctrine of *res ipsa loquitur* does not apply. *Trull v. Well Co.*, 264 N.C. 687, 142 S.E. 2d 622 (1965); *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9 (1957); *Hopkins v. Comer*, 240 N.C. 143, 81 S.E. 2d 368 (1954); *Smith v. Oil Corp.*, 239 N.C. 360, 79 S.E. 2d 880 (1954); see, *Kekelis v. Machine Works*, *supra*.

The plaintiffs' evidence failed to raise more than a speculation as to the cause of the fire, and the doctrine of *res ipsa loquitur* is not applicable to the facts of this case since the cause of the fire was not established and the defendant did not have exclusive control over the electrical equipment. Therefore, the trial court erred in failing to direct a verdict in favor of the defendant.

The judgment in favor of the plaintiffs is vacated and the case is remanded for entry of a directed verdict in favor of defendant.

Judges MITCHELL and WEBB concur.

MR. & MRS. JOHN SANDERS, D/B/A R & R FUEL OIL SERVICE v. ROY WALKER AND ROCHELLE WALKER, D/B/A R & R FUEL OIL SERVICE

No. 7821DC319

(Filed 2 January 1979)

1. Trademarks and Trade Names § 1— injunction to prevent use of business name—sufficiency of evidence of sale

In an action for an injunction to prevent defendants from doing business as R & R Fuel Oil Service, there was sufficient evidence from which to find that there was a sale of the business by defendants to plaintiffs and to support the trial court's ruling in favor of plaintiffs.

2. Trademarks and Trade Names § 1— fuel oil company name—no personal trade name

In an action for an injunction to prevent defendants from doing business as R & R Fuel Oil Service, defendants' contention that "R & R Fuel Oil Service" was a personal trade name that would not be conveyed with the sale of the business is without merit, since a personal trade name would not arise in the delivery of fuel oil, nor could "R & R" be viewed as promising to the public the care and skill of a certain individual even if there were evidence that the public knew that those initials stood for the first names of defendants.

3. Rules of Civil Procedure § 52— failure to make findings and conclusions—no right of party to complain

Defendants' contention that the trial court erred in failing to make findings of fact and conclusions of law is without merit since defendants, who

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agreed to disregard G.S. 1A-1, Rule 52(a)(1) at the trial level by stipulating that the court's answers to the issues would constitute a finding of facts and conclusions of law by the court, could not change their minds on appeal.

APPEAL by defendants from *Tash, Judge*. Judgment entered 18 November 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 6 December 1978.

Plaintiffs and defendants are each doing business in Forsyth County under the name of R & R Fuel Oil Service; their businesses are identical in nature and directly in competition with each other. Plaintiffs seek an injunction to prevent defendants from doing business as R & R Fuel Oil Service, and damages. Defendants counterclaim for the same relief from plaintiffs.

Between 1961 and 1974 defendants operated R & R Fuel Oil Service in Forsyth County; in August 1975 they resumed such a business. The plaintiffs allege that they purchased the business from defendants in January 1974 for \$1,500; the defendants aver that the plaintiffs purchased from them a truck only, and that defendants temporarily suspended but did not abandon or sell their business during 1974 and 1975. The trial court permanently enjoined defendants from using the trade name, and awarded plaintiffs \$1 and costs. Defendants appeal.

Harvey L. Kennedy and Annie Brown Kennedy for defendant appellants.

James L. Cole and L. G. Gordon, Jr., for plaintiff appellees.

ARNOLD, Judge.

Defendants first assign error to the denial of their motions to dismiss at the close of plaintiffs' evidence and all the evidence. They argue that there is insufficient evidence of a sale of the business, and that even if a sale is found the name of the business is a personal trade name that would not be conveyed as part of the sale.

[1] It is stipulated that defendants owned and operated the R & R Fuel Oil Service from 1961 to 1974. To be entitled to an injunction against further use of the business name by defendants plaintiffs had to show either that defendants sold the business to the plaintiffs in 1974, or that defendants had abandoned the business

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in 1974. Since there were no allegations of abandonment, the only question we consider is whether there was sufficient evidence of a sale of the business to take the matter to the trier of fact.

A motion to dismiss under G.S. 1A-1, Rule 41(b) raises the question of whether any findings could be made from the evidence to support a recovery. *Gibbs v. Heavlin*, 22 N.C. App. 482, 206 S.E. 2d 814 (1974); 11 Strong's N.C. Index 3d, Rules of Civil Procedure § 41. In ruling on the motion the evidence must be viewed in the light most favorable to the plaintiff. *Rogers v. City of Asheville*, 14 N.C. App. 514, 188 S.E. 2d 656 (1972). Plaintiff, John Sanders, testified that in the latter part of 1973

"Mr. Walker approached me about taking over R & R Fuel Oil Service and purchasing the business from them for the amount of One Thousand Five Hundred Dollars (\$1,500.00). . . . At the time I agreed to purchase R & R Fuel Oil Service, there was only the one truck that was operable and some meter tickets which were left in the truck. There was no list of customers or any other supplies of note that could be used in a fuel oil delivery business. Mr. Walker told me the reason for selling the business was that he wanted to move to the coast where he could buy an apartment house and fish.

I paid Mr. Walker the sum of One Thousand Five Hundred Dollars (\$1,500.00) for the business, which included the truck and the meter tickets."

Plaintiff Melita Sanders testified that "Mr. & Mrs. Walker approached us in 1973 in conversation concerning the possible purchase of the business. . . . I did hear Mr. Walker say that they wanted to move to the coast and get out of the fuel oil business. . . . It was my understanding that we were purchasing the entire business and, certainly, that we were not purchasing just a truck for Fifteen Hundred Dollars (\$1,500.00)."

Defendant Rochelle Walker testified that "[w]hen we moved back, I told John [Sanders, the plaintiff,] that we were going to *go back* into the oil business and were going to *take back* our name." (emphasis added.) Defendant Roy Walker testified that "[i]f I ever wanted to *go back into business*, I could buy another truck." (emphasis added.) He also testified that he had originally paid \$999.95 for the truck he later allegedly sold to plaintiffs for \$1,500. In ad-

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dition, there is uncontradicted evidence that during the period when plaintiff alone operated an R & R Fuel Oil Service, the defendants were well aware of plaintiffs' use of that name and did not object. There is sufficient evidence from which to find that there was a sale of the business by defendants to plaintiffs, and to support the court's ruling in favor of plaintiffs.

[2] Defendants contend that even if there were a sale, "R & R Fuel Oil Service" is a personal trade name that would not be conveyed with the sale of the business. They rely on the testimony of defendant Rochelle Walker that "[t]he initials R & R stand for Roy and Rochelle." Defendants' contention is without merit.

A trade name is personal "where it indicates to the public that the personal care and skill of a certain individual have been exercised in the selection or production of the goods or the rendition of the services." 74 Am. Jur. 2d, Trademarks and Trade-names § 22 at 718. A personal tradename arises only in a limited number of situations, and we fail to see how it could occur in the delivery of fuel oil, or how "R & R" could be viewed as promising to the public "the care and skill of a certain individual" even if there were evidence that the public knew that the initials R and R stood for Roy and Rochelle.

The defendants' contention that any purported sale of the business is void for violations of the Statute of Frauds need not be reviewed. The Statute of Frauds is an affirmative defense which must be specially pleaded, G.S. 1A-1, Rule 8(c), and it was neither pleaded nor raised at trial. It cannot be presented for the first time on appeal. *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E. 2d 867 (1971). For the same reasons, defendants cannot now argue that there could have been no sale of the partnership business because Mrs. Walker, as a partner, did not give her consent to a sale.

[3] Finally, defendants say that the trial court erred in failing to make findings of fact and conclusions of law, and specifically in failing to find that defendants had either sold or abandoned the business. While it is true that G.S. 1A-1, Rule 52(a)(1) requires the court to "find facts specially and state separately its conclusions of law," the judgment in this case states:

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I. The parties submitted to the Court the following issues, stipulating that the Court's answers to the issues would constitute a finding of facts and conclusions of law by the Court. . . .

The practice of agreeing to disregard the statute is disapproved, *see Wynne v. Allen*, 245 N.C. 421, 96 S.E. 2d 422 (1957), because the mere answering of issues fails to provide an adequate basis for appellate review. However, a party cannot agree at the trial level to disregard the statute and then change his mind on appeal.

While defendants also argue that in fact they did not stipulate that the issues would be in lieu of findings of fact and conclusions of law, there is no indication in the record that such is the case. "We do not consider . . . matters not supported by . . . the *record on appeal*. A brief is not a part of the *record on appeal*." *Civil Service Bd. v. Page*, 2 N.C. App. 34, 40, 162 S.E. 2d 644, 647-48 (1968).

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. DOUGLAS GUFFEY

No. 7815SC694

(Filed 2 January 1979)

1. Criminal Law § 99.1— expression of opinion by trial court

The trial court expressed an opinion on the evidence in violation of G.S. 15A-1222 when, during a discussion of defendant's motion to quash indictments charging him with taking indecent liberties with two children, he remarked in the presence of prospective jurors, "Well, it's two different—two different people. He was pretty busy that day."

2. Crime Against Nature § 3; Rape § 19— taking indecent liberties with minors —failure to prove exact date of crimes—no fatal variance

In this prosecution for taking indecent liberties with two minor boys, there was no fatal variance between indictment and proof where the indictment alleged the offenses were committed "on or about the 28th day of June, 1977" and testimony showed that the minors did not remember the exact dates of the offenses, that the first incident occurred during the last two weeks of June 1977 and the second about two or three weeks later, and that an officer,

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the minors and the magistrate determined together as best they could that 28 June was the approximate date.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 1 March 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 15 November 1978.

Defendant was indicted for taking indecent liberties with children (G.S. 14-202.1), a 13-year-old and an 11-year-old boy, on or about 28 June 1977. The 13-year-old testified for the State that one day during the last two weeks of June 1977 he was at defendant's house and defendant held him down on the bed and had oral sex with him. About two or three weeks later the boy returned to defendant's house with his 11-year-old cousin, and that day he found defendant in the barn forcing the 11-year-old to have oral sex with him. The 11-year-old testified to the same facts about the second incident. A week or two after that, the boys were at defendant's house and defendant made advances to the 11-year-old again. Neither boy remembered the dates when the incidents occurred. Officer Qualls testified that on 27 August both boys gave him statements about the incidents.

Defendant presented witnesses who testified to his good reputation. He testified that he ran the boys off his property in May 1977 and they have not been back since then. He denied that he went into the barn with either of the boys and that they had been in his bedroom. He never attempted to have any indecent relations with either of them.

Defendant was found guilty and sentenced to two ten-year terms, the second to be suspended for five years with the defendant placed on five years probation. Defendant appeals.

Attorney General Edmisten, by R. W. Newsom III, for the State.

John D. Xanthos for defendant appellant.

ARNOLD, Judge.

G.S. 15A-1222 provides: "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Although this section did not become effective until 1 July 1978, subsequent to this

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defendant's trial, it is to be applied without regard to when guilt was established or judgment entered. Session Laws 1977, c. 711, s. 39. (Also, see G.S. 15A-1232 which brings forth the substance of repealed G.S. 1-180.) Defendant contends that this provision was violated, to his prejudice. We agree.

[1] Prior to trial the defendant moved to quash the indictment, saying: "It charges two crimes. It's all one count." The judge responded: "Well, it's two different—two different people. *He was pretty busy that day.*" (emphasis added.) This took place in the courtroom, in the presence of prospective jurors who would be called to serve on the case.

We recognize that not every improper remark by a trial judge requires a new trial. *State v. Blue*, 17 N.C. App. 526, 195 S.E. 2d 104 (1973). Here, however, as in *State v. Whitted*, 38 N.C. App. 603, 248 S.E. 2d 442 (1978), the judge's statement went to the heart of the trial, assuming defendant's guilt. As our Supreme Court has noted, "[j]urors respect the judge and are easily influenced by suggestions . . . emanating from the bench." *State v. Holden*, 280 N.C. 426, 429, 185 S.E. 2d 889, 892 (1972). The situation before us is much like that in *State v. Teasley*, 31 N.C. App. 729, 230 S.E. 2d 692 (1976); the judge intimated the defendant's guilt at an early stage of the trial. This Court found that the defendant in *Teasley* was entitled to a new trial. In the present case, prejudice to the defendant is inherent in the judge's statement. "[T]he judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an . . . opinion. . . ." *State v. Canipe*, 240 N.C. 60, 64, 81 S.E. 2d 173, 177 (1954).

Even though we are mindful of the added, severe emotional strain that a new trial may bring, especially for the alleged victims, young boys, the statement by the trial court requires a new trial in this case. His improper and unnecessary remarks likewise required new trials to be granted by this Court in *Whitted*, *Teasley* and *State v. Hewitt*, 19 N.C. App. 666, 199 S.E. 2d 695 (1973), and by our Supreme Court in *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). In still other cases his remarks were found to be improper but not so prejudicial as to require a new trial in view of all the evidence and totality of circumstances. *State v. Holden*, *supra*; *State v. Norris*, 26 N.C. App. 259, 215 S.E. 2d 875 (1975); and *State v. Blue*, *supra*.

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The improper statement in this case, as well as in some of the cited cases, may have been intended as humor. If so, it missed the mark when viewed from a standpoint of justice and fair play. The fact that an accused may be charged with a despicable crime, and the evidence of guilt may appear to be overwhelming, does not justify the expression of an opinion. Lord Herschell's admonition is still pertinent: "Important as it is that people should get justice, it is even more important that they be made to feel and see that they are getting it."

[2] We do not reach defendant's other assignments of error, save one, since they are unlikely to occur at a new trial. The one exception is defendant's contention that there was a fatal variance between the indictment and the proof. The indictments allege that the crimes were committed "on or about the 28th day of June, 1977." The testimony of the boys involved indicated that the first incident occurred during "the last two weeks of June, 1977" and the second "about two or three weeks later." They both stated that they did not remember what the dates were, and Officer Qualls testified that he, the boys and the magistrate determined together as best they could that 28 June was the approximate date.

The defendant argues at length that it is fatal to the State's case that the State did not prove that the crimes occurred on 28 June, or any other specific date. This is incorrect. Where the statute of limitations is not involved, time is not of the essence of the offense charged, and the defendant does not rely on alibi as a defense, variances of as much as 27 days have been found not fatal. 7 Strong's N.C. Index 3d, Indictment & Warrant § 17.2. See G.S. 15-155. The purpose of the rule as to variance is to avoid surprise, *State v. Martin*, 29 N.C. App. 17, 222 S.E. 2d 718 (1976), and the discrepancy must not be used to ensnare the defendant or to deprive him of an opportunity to present his defense. *State v. Lilley*, 3 N.C. App. 276, 164 S.E. 2d 498 (1968). There is no showing that any of those factors was present here.

Directly on point is *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962), where the victim of a crime against nature was a six-year-old, and the child's statements varied substantially as to where and when the crime took place. The court said: "It must be conceded that the evidence of [the child] was vague as to the time

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the alleged crime was committed by the defendant. We think, however, the vagueness of this child's testimony goes to its weight rather than to its admissibility." *Id.* at 239, 123 S.E. 2d at 488. We find that there was no fatal variance between the indictment and the proof.

New trial.

Judges MORRIS (now Chief Judge) and MARTIN (Harry C.) concur.

MORGAN REES POAG v. EDWARD L. POWELL, COMMISSIONER OF DIVISION OF
MOTOR VEHICLES

No. 7818SC250

(Filed 2 January 1979)

1. Rules of Civil Procedure § 52— failure to make findings of fact—no reversible error

Though the trial court erred in failing to make findings of fact in support of its conclusion that an officer arrested plaintiff "upon reasonable grounds," such error was not reversible since the facts leading up to the arrest were uncontradicted; only the conclusion to be drawn from them was disputed; and the judge's conclusion could be reviewed on appeal without the aid of detailed findings of fact.

2. Automobiles § 126.2— refusal to take breathalyzer test—pretended cooperation

Evidence was sufficient to support the trial court's conclusion that defendant willfully refused to submit to a breathalyzer test where it tended to show that defendant was told to breathe into the machine; he placed his mouth on the mouthpiece of the machine but no air sample sufficient for a reading appeared; defendant was given further instructions and two more opportunities to breathe into the machine; and the machine had been tested and found to be working properly immediately before the test was administered.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 28 December 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 December 1978.

Plaintiff brought this action under G.S. 20-16.2(e) against defendant Commissioner of the Division of Motor Vehicles for a review of the revocation of his driving privileges. According to

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plaintiff's complaint, the revocation was based on a finding that he refused to take a breathalyzer test; plaintiff denies that he refused the test. A temporary restraining order staying the revocation was entered and continued until the case could be resolved on the merits.

At the hearing, Officer Ronald Bradley of the Chapel Hill Police Department testified that on 4 September 1976 he had observed plaintiff making a right turn, and that plaintiff had driven approximately 100 yards on the left-hand side of the street before returning to the right-hand side. He stopped the plaintiff and asked him to step from the car. There was "a strong odor of alcoholic beverage on or about his person; also his face was very red and flushed; his eyes were glassy and bloodshot." It was Bradley's opinion that the plaintiff had consumed enough intoxicating beverages that his mental and physical faculties were appreciably impaired. Bradley arrested him for driving under the influence, had him perform dexterity tests at the scene, and then took him to the Police Department breathalyzer room.

Bradley asked the plaintiff to take the breathalyzer test, and plaintiff said he would take it. Officer Kenneth Rogers, a qualified breathalyzer operator, was there to administer the test. Rogers explained to plaintiff what was required of him physically in taking the test and plaintiff placed his mouth on the mouthpiece but no air sample sufficient for a reading appeared. Rogers instructed him twice more and gave him two more opportunities, but did not obtain an air sample. Bradley testified that throughout this period and later when the plaintiff was taken before a magistrate plaintiff was insisting that he wanted to take the test.

The plaintiff testified that he complied with all of Rogers' instructions concerning the breathalyzer test, and that he did blow into the mouthpiece. He had had two drinks at the football game that afternoon and one drink and part of a beer between the game and the time he was stopped by Officer Bradley, which was approximately 10 p.m. He denied that his physical or mental faculties were impaired. Officer Frick of the Chapel Hill Police had told him before he got into his car that if he tried to drive, Frick would pull him on suspicion of driving under the influence. The plaintiff had taken a breathalyzer test in 1973 in Chapel Hill, and he had no trouble getting a reading then.

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The court found that the plaintiff had wilfully refused to take the breathalyzer test, dissolved the restraining order against the defendant, and affirmed the revocation of plaintiff's driver's license. Plaintiff appeals.

William L. Stocks for plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for the State.

ARNOLD, Judge.

G.S. 20-16.2 provides for the mandatory revocation of the driver's license of any person who refuses to submit to chemical tests to determine the alcoholic content of his breath or blood after he has been arrested for driving under the influence of liquor. Plaintiff brings this action under G.S. 20-16.2(e) for review of the revocation of his driving privileges. G.S. 20-16.2(d) sets out the scope of the initial hearing from which appeal may be taken to the Superior Court. That hearing is to cover, among other issues, "whether the law-enforcement officer had reasonable grounds to believe the person had been driving . . . while under the influence of intoxicating liquor, . . . and whether he willfully refused to submit to the test upon the request of the officer."

[1] Plaintiff first assigns error to the failure of the court to make findings of fact in support of its conclusion that Officer Bradley arrested the plaintiff "upon reasonable grounds." Under G.S. 1A-1, Rule 52(a)(1), in all actions tried without a jury the court is required to "find the facts specially and state separately its conclusions of law thereon." By its bare finding "[t]hat on the 4th day of September, 1976, the plaintiff was arrested by a law-enforcement officer, Patrolman Ronald Bradley of the Chapel Hill Police Department, upon reasonable grounds, for the offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor" the court failed to comply with the statute. Plaintiff argues that such a failure is reversible error, citing *Jones v. Murdock*, 20 N.C. App. 746, 203 S.E. 2d 102 (1974). While we do not approve of the trial judge's failure to comply with the statute, we see no purpose that would be served by remanding for findings of fact, see, e.g. *Jamison v. Charlotte*, 239

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N.C. 423, 79 S.E. 2d 797 (1953), or by awarding the plaintiff here a new trial. As this Court indicates in *Jones*, the requirement that facts be found specially is intended to provide a basis for appellate review. The facts leading up to the arrest in this case are essentially uncontradicted; only the conclusion to be drawn from them is disputed. Accordingly, we are able to review the judge's conclusion adequately without the aid of detailed findings of fact. Having done so, we find that there was sufficient evidence to support his conclusion that there were reasonable grounds for the arrest.

[2] On the issue of whether the plaintiff refused to submit to the breathalyzer test, the trial court made findings of fact. The plaintiff argues that the court was in error in concluding from these findings that he willfully refused to submit to the test. We disagree. While we think it would have been better practice for the officer administering the test to check the machine for proper functioning when he failed to obtain an air sample, we note that the machine had been tested and found to be working properly immediately before the test was administered. The plaintiff was three times instructed in using the machine and told that a failure to give a sufficient sample would be treated as a willful refusal. The facts provide sufficient support for the judge's conclusion.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. PAUL E. INMAN, JR.

No. 7818SC902

(Filed 2 January 1979)

1. Criminal Law § 89.7; Witnesses § 1— physical and psychiatric examination of witness—refusal proper

Defendant was not entitled to have his codefendant, who was to testify for the State, examined by a physician and psychiatrist before he testified.

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2. Constitutional Law § 31— indigent defendant—appointment of investigator denied

A private investigator may be appointed by the superior court to aid an indigent defendant, but such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense; defendant failed to show the necessity for an investigator in this case where he alleged that two witnesses could offer evidence in his behalf if they could be located by the investigator, but one was being sought by police and the other was subject to subpoena, and there was no showing how the investigator could have been of any help.

3. Judges § 5— recusal properly denied

The trial judge did not err in denying defendant's motion that he recuse himself on the ground that the judge had presided over a trial in 1973 at which defendant was convicted of breaking or entering, since the judge had no recollection of the previous trial.

4. Criminal Law § 112.7— recapitulation of testimony—no evidence of alibi—no instruction required

Defendant's contention that the trial court erred in failing to recapitulate the testimony of his only witness as to defendant's alibi is without merit where there was no testimony from the witness that defendant was somewhere else at the time of the crime.

5. Criminal Law § 118.1— instructions on contentions—failure to object at trial

Defendant's contention that the court erred by failing to put equal stress on the contentions of the State and those of defendant is without merit where defendant did not object at the trial to the court's statement of the contentions.

APPEAL by defendant from *Long, Judge*. Judgment entered 6 April 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals at Winston-Salem on 6 December 1978.

The defendant appeals from a sentence imposed after he was convicted of armed robbery. Prior to the trial, the defendant made the following motions: (1) that the State provide an independent investigator for the defendant, (2) that Robert Preston Parrish, a co-defendant who was to testify for the State, be examined by a physician and a psychiatrist not under the direct control of the State of North Carolina, and (3) that Judge Long recuse himself. All three motions were denied.

The State offered evidence, including the testimony of Robert Parrish, that the defendant and Robert Parrish robbed William L. Johnson, a ninety-year-old man of approximately \$4,000.00 by holding a knife at his throat and taking the money

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from his pocket. William L. Johnson was not able to identify either of the two people who he testified robbed him. The defendant was sentenced to 28 to 30 years in prison.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Lee and Johnson, by Michael M. Lee and Charles R. Coleman, for defendant appellant.

WEBB, Judge.

The defendant's assignments of error pertain to the denial of his motions, the jury charge, and the admission of certain evidence.

[1, 2] As to the defendant's motion that Robert Preston Parrish be examined by a physician and psychiatrist before he testified, we believe we are bound by *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). A similar motion was denied by the superior court in that case and the Supreme Court affirmed, saying that such a change in criminal procedure should be brought about by the Legislature and not the courts. As to the motion that the defendant be provided with a private investigator, this question has been before the Supreme Court of North Carolina in several cases. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976) and *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). The rule in this state is that an investigator may be appointed by the superior court to aid an indigent defendant, but such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. Mere hope or suspicion that such evidence is available will not suffice. In this case the defendant in his motion for an independent investigator alleged as follows:

"That certain aspects of this case, upon investigation may prove invaluable to this defendant in his defense and the location of certain witnesses may also be necessary for the proper defense of this case; . . ."

At the hearing on this motion, it was revealed in the statements of counsel that there were two witnesses in particular that the

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defendant wanted. One was a third suspect in the robbery whom the police had interrogated. This man had absconded before the trial and the police were searching for him. The defendant's attorney also stated that a person had approached the defendant Inman and told him that he knew of the plan for the robbery before the robbery occurred and he knew an effort would be made to implicate the defendant in the robbery. The person who told Mr. Inman this had refused to come to court and "indicated to him, if subpoenaed, he would deny or disclaim any knowledge of these facts."

We hold that the defendant did not make a clear showing that specific evidence was reasonably available for a proper defense so that an independent investigator could be appointed. As to the witness for whom the police were searching, we cannot see how he would be reasonably available to a private investigator if the police could not find him. As to the witness who had talked to defendant, he was subject to subpoena. We cannot see how a private investigator could have helped to get him to court or to testify.

[3] The defendant's motion that Judge Long recuse himself was made on the ground that he had presided over a trial in 1973 at which the defendant was convicted of breaking or entering and a sentence of from four to eight years was imposed. Judge Long had no recollection of the previous trial. We hold he did not abuse his discretion by refusing to recuse himself.

[4, 5] The defendant has also assigned error in regard to the charge. He contends first that the court did not recapitulate the testimony of his only witness as to the defendant's alibi. The defendant offered one witness, Larry Pruitt, who testified he knew defendant and Robert Parrish as well as some others. The main thrust of Mr. Pruitt's testimony was that someone was trying to falsely inculcate defendant in the robbery. We can find no testimony from Mr. Pruitt that defendant was somewhere else at the time of the crime. There was no testimony of Mr. Pruitt as to alibi which the court could recapitulate. The defendant also contends the court did not put equal stress on the contentions of the State and defendant. The defendant did not object at the trial to the court's statement of the contentions. Any objection to the court's statement of defendant's contentions is deemed waived by

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his failure to object. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). We have read the court's charge nevertheless and it appears to us the court fairly stated the defendant's contentions and properly applied the law as to alibi.

The defendant's last assignment of error deals with the testimony of Allen G. Travis, a detective in the City of Greensboro Police Department. It is difficult to deal with this assignment of error. There is no objection to it in the narrative of Mr. Parrish's testimony as it appears in the record. The record contains a statement from the judge that during the testimony of Robert Parrish, the defendant's counsel approached the bench and objected to the testimony of Travis "that Robert Parrish had corrected his statement after it had been written as it may have related to who told him the money was at the Johnson residence." This objection was overruled. We hold the testimony of Mr. Travis as to what Robert Parrish told him was properly admitted as evidence in corroboration of the testimony of Robert Parrish. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 51, p. 146.

No error.

Judges CLARK and MITCHELL concur.

IN THE MATTER OF THE RIGHT TO PRACTICE LAW OF WHEELER DALE,
ESQ.

No. 7725SC664

(Filed 2 January 1979)

Attorneys at Law § 12— failure to perfect criminal appeal—suspension of privilege to practice law

The privilege of an attorney to practice law in the State of North Carolina is suspended for 90 days for his violation of D.R. 6-101(A) of the Code of Professional Responsibility by failing to perfect the appeal in a rape case involving the death penalty after having been appointed by the trial court to represent the defendant on appeal.

THE above-styled cause was reheard in this Court on 5 December 1978 upon Order of this Court. The cause was original-

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ly heard upon appeal on 23 May 1978. An interlocutory opinion, which is reported in 37 N.C. App. 680, 247 S.E. 2d 246 (1978), was filed 29 August 1978. In that opinion the undisputed facts of record were recited. Adopting and following the opinion of this Court in the case of *In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978), the order of Judge Snapp imposing discipline on the respondent was vacated, and the cause was retained in this Court for consideration of what discipline, if any, should be imposed upon respondent for his conduct as disclosed by the record before this Court. Respondent was given the opportunity to file a new brief addressing the question of whether this Court should exercise its inherent power to determine what discipline, if any, should be imposed on respondent, and, if any, what the extent thereof should be. Respondent did not file a new brief.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward, for the State.

Simpson, Baker & Aycock, by Dan R. Simpson and Samuel E. Aycock for respondent appellant.

PARKER, Judge.

The record shows that the following facts are undisputed. Respondent, Wheeler Dale, is licensed to practice law in North Carolina. He began the practice of law in 1963 or 1964. From 1970 to 1974 he served a term as District Court Judge. On 17 February 1976 he was appointed to represent the defendant in the trial of Case 76CR1377, *State v. Kenneth Mathis*, in which the defendant was charged with first degree rape. Respondent appeared for the defendant in the trial of that case, which resulted in the defendant's conviction and a sentence of death. Notice of appeal was given and respondent was appointed to represent the defendant upon the appeal. On 30 July 1976 the Judge of Superior Court extended the time for serving the case on appeal to 30 August 1976. On 23 August 1976 respondent received the transcript of the trial. Respondent did not serve the case on appeal and took no further action to perfect the appeal. On 29 March 1977 the District Attorney filed a motion to dismiss the appeal for the reason that the case on appeal had not been served and the appeal had not been perfected. On 11 May 1977 the Court relieved the respondent of

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any further duties in the case of *State v. Mathis* and appointed other counsel to seek appellate review of that case. Thereafter, this disciplinary proceeding was instituted. At the hearing of this proceeding in the Superior Court, respondent testified that he had no excuse for his failure to perfect the appeal in the case of *State v. Mathis*.

The interlocutory opinion of this Court reported in 37 N.C. App. 680, 247 S.E. 2d 246 (1978) is hereby reaffirmed and incorporated in this opinion by reference. We now proceed to the matter of appropriate discipline.

The undisputed facts in this case establish that respondent violated the provisions of Disciplinary Rule 6-101A of the North Carolina Bar Code of Professional Responsibility, 283 N.C. 783, in his failure to perfect the appeal in the case of *State v. Mathis* in which sentence of death had been imposed. After giving careful consideration to all mitigating circumstances disclosed by the record, we find that the serious nature of respondent's infractions of the Code of Professional Responsibility warrants imposition of the following disciplinary action by this Court. Accordingly, we now hereby order:

1. That the privilege of the respondent, Wheeler Dale, to practice law in the State of North Carolina is hereby suspended for a period of ninety (90) days from the effective date of this order.
2. This order shall become effective on the date the mandate of this Court shall issue in this case as provided in Rule 32(b) of the Rules of Appellate Procedure.

FRANK M. PARKER

Judge

For the Court

Chief Judge MORRIS and Judge MARTIN (Harry C.), concur.

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STATE OF NORTH CAROLINA v. SAMUEL CONNER LIDDELL

No. 7824SC679

(Filed 2 January 1979)

Larceny § 4.2— ownership of property taken—no fatal variance

In a prosecution for breaking and entering and larceny, there was no fatal variance between the indictments which charged that the property taken belonged to Lees-McRae College and the proof that the property actually belonged to Mackey Vending Company and ARA Food Services, since the evidence disclosed that Lees-McRae, though not the owner, was in lawful possession of the property at the time of the offense.

APPEAL by defendant from *David Smith, Judge*. Judgment entered 12 April 1978 in Superior Court, AVERY County. Heard in the Court of Appeals 14 November 1978.

In Case #2048 defendant was indicted for breaking and entering, larceny and receiving for a theft from the Student Center of Lees-McRae College on 16 November 1977. In Case #2053 he was indicted for breaking and entering, larceny and receiving for a theft from the same student center on 10 November 1977. Over defendant's objection the cases were consolidated for trial.

The State presented evidence that Steve Cummings, the manager of the Student Center at Lees-McRae College, went to the Student Center at about 8:30 a.m. on 10 November 1977 and found that the building had been broken into. The pinball machine and cigarette machine had been broken into, and cigarettes were missing. The cigarettes and money in the machine belonged to Mackey Vending Company. At about 10:30 a.m. on 17 November 1977 Cummings again found the building broken into. Three hundred forty-three dollars which was kept in an orange bag in the freezer was missing. Later a box of hamburger patties was found to be missing. ARA Food Services, Steve Cummings' employer, owned the \$343.

Charles Link testified that he broke into the Student Center on 10 November with the defendant and that defendant took cigarettes and money from the cigarette machine and a box of hamburger patties from the refrigerator. On 16 November defendant again broke into the Student Center and came out with an orange NCNB bag.

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Kevin Riley, a student at Lees-McRae, testified that the defendant had asked him to help break into the Student Center. On 15 November defendant was observed selling some cigarettes, and on 18 November a search of defendant's motel room revealed an NCNB bank bag, cigarettes and some coin wrappers. Defendant's car was searched on 19 November and a box "about 'ninety per cent full of hamburger patties'" was found.

Defendant testified that he had nothing to do with the break-ins, that he had no conversations with Kevin Riley regarding the break-ins, and that he never saw any orange money bag or any hamburger patties.

In Case #2048 defendant was found guilty of felonious breaking or entering and non-felonious larceny. In Case #2053 he was found guilty of felonious breaking or entering and felonious larceny. He was sentenced to five years in the first case and ten years in the second, to run consecutively, with the second sentence suspended for five years and with five years probation. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Kaye R. Webb, for the State.

William B. Cocke, Jr., for defendant appellant.

ARNOLD, Judge.

The defendant contends that it was error for the two cases against him to be consolidated for trial. As he failed to renew his objection to the joinder at the close of all the evidence as G.S. 15A-927(a)(2) requires, we do not consider this contention.

Defendant also alleges a fatal variance between the second count of each indictment and the proof, which he says entitles him to a judgment as of nonsuit. The indictments charged the defendant with stealing "the property of Lees-McRae College under the custody of Steve Cummings." The evidence was, however, that the cigarettes and money taken in the first theft belonged to Mackey Vending Company and the money taken in the second theft belonged to ARA Food Services.

It is not always necessary that the indictment allege the actual owner. It is generally stated as the rule that no fatal variance exists when the indictment names an owner of the stolen

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property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time of the offense. *State v. Holley*, 35 N.C. App. 64, 239 S.E. 2d 853 (1978); *State v. Killian*, 14 N.C. App. 446, 188 S.E. 2d 529, rev'd on other grounds 282 N.C. 138, 191 S.E. 2d 699 (1972). Clearly Lees-McRae College was in lawful possession of the cigarettes, money and hamburger patties at the time they were stolen. It is sometimes said also that more than mere lawful possession is required; that the person holding the property must have a special property interest in it, as by being a bailee, *State v. Jenkins*, 78 N.C. 478 (1877), or a custodian, *State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977). Lees-McRae's custody of the property fits within the definition of a bailee. See 8 C.J.S. Bailments § 1. We find that there was no fatal variance between the indictment and the proof.

We note that the purposes of requiring an indictment to allege the ownership of the stolen property have been served here. The requirements are intended to "(1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense." *State v. Greene*, 289 N.C. 578, 586, 223 S.E. 2d 365, 370 (1976). We do not see how these purposes could have been better served had the indictments alleged ownership in Mackey Vending Company, and ARA Food Services.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES THOMPSON

No. 7826SC771

(Filed 16 January 1979)

1. Constitutional Law § 53— delay between arrest and trial—no denial of right to speedy trial

Defendant was not denied his right to a speedy trial on an armed robbery charge by the delay between his arrest on 27 October 1976 and his trial in the

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latter part of April 1978 where the case was calendared for trial and postponed at defendant's request in March, April and August 1977; in September 1977 defendant was tried on other armed robbery charges pursuant to the request of defendant's attorney that those charges be first tried; defendant's counsel and the prosecuting attorney engaged in extensive plea bargaining negotiations in connection with the present case in the fall of 1977, but no agreement was reached, and the present case was placed on the calendar for trial on 20 February 1978; the case was continued in February 1978 because of defendant's illness; defendant's only motion relating to a speedy trial was made on 28 March 1978, and his trial occurred within 30 days thereafter; and defendant was not prejudiced by the delay since witnesses referred to in defendant's motion were unavailable at any time after the end of 1976, and failure to bring defendant to trial before the end of 1976 was not of such duration as to amount to a denial of defendant's right to a speedy trial.

2. Criminal Law § 75.2— in-custody statements—effect of statements by officer

Defendant's testimony that he told officers that he had been to the office of a finance company in which a robbery occurred to inquire about purchasing a repossessed car because he felt like he had to clear himself after an officer told defendant he had statements from three witnesses that they had seen defendant leaving the scene shortly after the robbery did not compel the conclusion that defendant's statements were involuntary where there was no evidence that what defendant testified the officer told him was false.

3. Robbery § 5.4— failure to instruct on common law robbery—uncertainty as to whether guns were real

The trial court in an armed robbery case erred in failing to charge the jury on the lesser included offense of common law robbery where some uncertainty, albeit minimal, was expressed by the State's witnesses as to whether both of the guns used in the robbery were real or fake.

Judge ERWIN dissenting.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 26 April 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 December 1978.

Defendant was tried on his plea of not guilty to a charge of armed robbery. The State presented evidence to show that the defendant, armed with a pistol, and another man, armed with a shotgun, entered the office of Associates Financial Services, Inc. in Charlotte shortly after 4:30 p.m. on 17 September 1976. The defendant and his companion ordered the three employees present into the storage room, took \$1,750.00, and departed. Each of the employees, Myra Wright, Beverly Shinn, and J. M. Lamond, testified at the trial, identifying the defendant and describing the robbery.

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Defendant did not testify. Defendant's wife testified that defendant, accompanied by their daughter, left their home in Charlotte at some time after 4:00 p.m. on 17 September 1976 to get tennis shoes for the daughter, that they returned home between 5:00 and 6:00 p.m. bringing new tennis shoes, and that defendant left shortly thereafter for Florida. The owner of a motel in Niceville, Florida, which is about 700 miles from Charlotte, testified that at some time between 9:00 a.m. and 10:00 a.m. on 18 September 1978 defendant registered in his motel.

The jury found defendant guilty as charged. From judgment sentencing defendant to prison for a term of fifty years, with credit for time spent in pretrial confinement, defendant appeals.

Attorney General Edmisten by Assistant Attorney Nonnie F. Midgett for the State.

Tate K. Sterrett for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the denial of his motion to dismiss made on the ground that he had been denied his right to a speedy trial. "Factors to be considered in deciding whether a defendant has been denied his right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay." *State v. Hudson*, 295 N.C. 427, 432, 245 S.E. 2d 686, 690 (1978). The length of the delay is not in itself determinative, but all four factors must be weighed and balanced against each other to determine whether there has been a denial of the constitutional right to a speedy trial. An undue delay which is arbitrary, oppressive, or due to the prosecution's deliberate effort to hamper the defense violates the constitutional guarantee of a speedy trial. *State v. Hudson, supra*.

"The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case." *State v. Smith*, 289 N.C. 143, 148, 221 S.E. 2d 247, 250 (1976). In the present case, defendant was arrested on 27 October 1976. During October and November 1976 he was also arrested on several other armed robbery charges, including three concerning robberies alleged to have been committed at the Central Square

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Apartments in Charlotte. On 28 October 1976 counsel was appointed to represent the defendant in this and in the other cases pending against him. On 6 December 1976 the grand jury returned the indictment in the present case as a true bill against the defendant. On 12 January 1977 defendant waived arraignment and entered pleas of not guilty to this and the other charges pending against him. In discussions between defendant's counsel and the prosecuting attorney, defendant's counsel indicated that he had an extremely busy trial schedule through the month of February and until the middle of March, 1977, and that he could not be prepared to try defendant's cases during that period. The prosecuting attorney advised defendant's counsel that he would not call these cases until defendant's counsel was ready for trial. Defendant's counsel also requested that only one of the cases against defendant be called for trial, and the prosecuting attorney indicated it was his intention to call the Central Square Apartment cases for trial first. When all of the cases against the defendant were placed on the calendar for trial on 15 March 1977, defendant's counsel reminded the prosecuting attorney of their prior understanding. On being thus reminded, the prosecuting attorney requested the presiding judge to remove the cases from the trial calendar at that time, and the trial judge acceded to this request. The prosecuting attorney later indicated his intention to recalendar the cases against defendant for the middle of April, 1977. About 30 March 1977 defendant's counsel wrote to the prosecuting attorney indicating he would be out of town from 18 to 20 April and requesting that the cases not be called at that time. The defendant then requested a polygraph examination which could not be scheduled until 7 July 1977. (Defendant did not pass the polygraph examination.) Thereafter, defendant's counsel requested that the cases not be calendared in August 1977 because of his vacation plans. The cases were placed on the calendar for 29 August 1977, but prior thereto defendant's counsel advised the prosecuting attorney that he had problems with witnesses and needed a continuance in order to get these witnesses. Defendant's counsel prepared a letter, which defendant signed, requesting a continuance for two or three weeks.

On 19 September 1977 defendant was brought to trial on the armed robbery charges which arose out of robberies which had occurred at the Central Square Apartments. He was found guilty

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and was sentenced to prison for a term of forty years. (On appeal from judgment in that case, this Court found no error in opinion filed 29 August 1978. *State v. Thompson*, 37 N.C. App. 651, 247 S.E. 2d 235 (1978).)

During the fall of 1977, following the trial of the Central Square Apartments cases, defendant's counsel and the prosecuting attorney engaged in extensive plea bargaining negotiations in connection with the present case. No agreement could be reached, and the present case was placed on the calendar for trial on 20 February 1978, but defendant's illness forced a continuance.

On 28 March 1978 defendant filed a motion to dismiss the present case on the ground that he had been denied his constitutional right to a speedy trial. In this motion, and in an affidavit filed in support thereof, defendant alleged that certain witnesses who had accompanied him on his trip to Florida and who could testify as to his whereabouts on 17 September 1976 were no longer in North Carolina and that the defendant did not know where they were, so that these witnesses had become unavailable to testify in defendant's behalf. A hearing was held on defendant's motion, following which the trial court entered an order making detailed findings of fact which, in substance, are as hereinabove set forth. In addition, the court found that there was no showing that the witnesses referred to in defendant's motion would have been available at any time after the end of 1976. On these findings, the court denied defendant's motion to dismiss made on the ground that his constitutional right to a speedy trial had been violated. In this ruling we find no error.

"[T]he burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution," and "[a]n accused who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice." *State v. McKoy*, 294 N.C. 134, 141, 240 S.E. 2d 383, 388 (1978). The present case was calendared to be tried no less than four times prior to the trial. In March, April, and August, 1977, the trial was postponed at the defendant's request. In February 1978 it was postponed because of defendant's illness. There was no showing that the trial was ever arbitrarily delayed by the prosecution or that the prosecution engaged in

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any deliberate effort to hamper the defense. On the contrary, the record reveals that the prosecution cooperated with defendant's counsel in an effort to assure that the trial of this case should take place at a time which would be fair both to the State and to the defendant. At no time did defendant ever request a speedy trial, his first and only motion relating to a speedy trial being his motion to dismiss the charges against him based on his contention that he had already been denied his constitutional right to a speedy trial. This motion was made on 28 March 1978, and the trial of this case occurred within thirty days thereafter. Finally, there was no showing that defendant was prejudiced by delay in his trial, at least as to such delay as occurred after 1976. The record supports the trial court's finding that there was no showing that the witnesses referred to in defendant's motion would have been available at any time after the end of 1976. Certainly, any failure to bring defendant to trial between the time of his arrest on 27 October 1976 and the end of 1976 could not reasonably be considered of such duration as to amount to a denial of defendant's constitutional right to a speedy trial, and defendant does not so contend. When the four factors to be considered in deciding whether defendant in this case has been denied his constitutional right to a speedy trial are weighed and balanced, we agree with the trial court's conclusion that there was no such denial in this case. Defendant's first assignment of error is overruled.

Defendant next assigns error to the denial of his motion to suppress evidence concerning his oral and written statements made to the police following his arrest. In these statements defendant denied committing the robbery but admitted he had been to the office of Associates Financial Services, Inc., stating he had been there for the purpose of inquiring about the possibility of purchasing a repossessed automobile. Defendant contends that evidence concerning his statements should have been suppressed because his statements were not voluntary. Prior to ruling on defendant's motion the trial court held a voir dire hearing at which both the State and the defendant presented evidence concerning the circumstances under which defendant's statements were made. Following this hearing the court entered an order making detailed findings of fact, including findings that prior to making any statements defendant had been fully advised of his constitutional rights and had signed a written waiver of those

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rights. Based on its detailed findings of fact, the court found that defendant's statements had been voluntarily made.

[2] A trial judge's finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Here, there was ample evidence to support the trial judge's findings that defendant's inculpatory statements to the police were voluntarily made. Defendant's testimony at the voir dire hearing that he made his statements because he "felt like [he] had to clear [himself]" after the police officer had told him that he had three statements from three different people saying that they had seen defendant leaving the scene shortly after the robbery, does not compel the conclusion that his statements were involuntary. *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935), cited and relied on by the defendant, is distinguishable. In *Anderson* a confession was held not competent because it appeared from the testimony of the State's witness that the confession was obtained by falsely telling the confessor that his co-defendants had talked and that defendant had better confess. Here, there was no evidence that what defendant testified the police officer had told him concerning having statements from three other persons was false. Moreover, defendant himself testified on cross-examination at the voir dire hearing that any statements he gave the police were freely and voluntarily made. There was no error in overruling defendant's motion to suppress and in the admission in evidence of defendant's inculpatory statements.

Defendant has brought forward a number of assignments of error in arguments numbered 3 through 7 in his brief. We have examined these carefully and find no error in connection with any of the assignments of error thus brought forward. We do not feel that any of these merit discussion, particularly since defendant must be awarded a new trial for the reason hereinafter stated.

[3] Defendant's final contention is that the trial court erred in failing to charge the jury on the lesser included offense of common law robbery and in failing to submit an issue as to defendant's guilt or innocence of that offense. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from

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which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547 (1954).

In the present case all three victims of the robbery, Myra Wright, Beverly Shinn, and J. M. Lamond testified as State's witnesses on direct examination that defendant used a chrome pistol and his companion used a sawed-off shotgun to perpetrate the robbery. Defendant did not testify before the jury but presented evidence tending to establish an alibi. Thus, conflict in the evidence, if conflict exists, as to whether the robbery in this case was perpetrated by the use or threatened use of any firearms or other dangerous weapon, must be found, if at all, in the State's evidence. On direct examination the State's witness, Myra Wright, testified that the shotgun used by one of the robbers was held "right on [her] forehead" and that it "felt like cold metal." On direct examination the State's witness, Beverly Shinn, testified that defendant had a gun in his hand and that "[i]t looked like a chrome pistol," that "[h]e came back to [her] desk and held it to [her] stomach," and that "[i]t was definitely metal of some kind." However, on cross-examination the State's witness, Myra Wright, testified:

As to whether it is true that I don't know whether the shotgun about which I have testified was a real gun, a fake gun, a toy gun, or what kind of gun, whatever kind of gun it was, it was metal and did not look like a toy. No, I don't know that it wasn't a toy gun. No I don't know whether it was a fake gun, either. With respect to the pistol about which I have testified, it was metal and did not look like a toy. I do not know whether it was real or whether it was a toy. It was shiny like chrome.

And on cross-examination the State's witness, J. M. Lamond, testified:

With respect to the pistol, I don't know whether it was a real pistol, fake pistol, or what kind of pistol. It looked very real. It was not a cap pistol.

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In our opinion any conflict in the State's evidence which might reasonably be viewed as raising a question as to whether the robbery in this case was effected with the use of firearms was minimal indeed. We would be inclined to agree with the trial court that the evidence in this case was insufficient to warrant submission of common law robbery as a possible verdict except for the decision of our Supreme Court in *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971). In that case, as in this one, the defendant was tried on his plea of not guilty to a charge of armed robbery. The State presented the testimony of the victim of the robbery who testified that about 2:40 p.m. on 23 March 1970 the defendant, who was known to her, came into her place of employment accompanied by another man and, while threatening her with a pistol, demanded the money in the register; that she gave him \$84; and that the two men fled. On cross-examination she testified: ". . . I don't know whether it was a real or toy pistol or whether it was metal or rubber." The State also presented evidence to show that the defendant was apprehended about 7:15 p.m. on the day of the robbery and that shortly thereafter, after having been duly advised of his rights, he confessed to the robbery and told the investigating officers that he divided the money with other persons involved and returned the .22 caliber pistol he used to its owner. Defendant's evidence tended to show that he had spent the day in question drinking wine and "shooting" heroin, that he remembered nothing from the time he passed out about noon until he was awakened that night, that he did not remember the robbery, but that he remembered confessing because the officers kept asking him about the robbery. On this evidence our Supreme Court found a sufficient conflict to trigger the requirement for an instruction on common law robbery. In this connection the Court said:

Here, the State's witness Loretta Williams testified that defendant robbed her by use of a pistol. On cross-examination she said that she did not know whether it was a "real or toy pistol." The State offered defendant's confession, which contained a statement by defendant that he used a .22 caliber pistol to rob Loretta Williams. However, defendant testified before the jury that because of the effect of wine and heroin in his system he passed out about noon on the day the crime was committed and remembered nothing until he was awak-

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ened that night by friends. He specifically denied any recollection of the alleged robbery or the possession by him of a pistol.

This conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery.

The critical and essential difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." *State v. Covington, supra*.

Thus, the trial judge, even without request for special instructions, should have submitted the lesser offense of common law robbery to the jury under proper instructions.

278 N.C. at 87, 178 S.E. 2d at 183.

In *State v. Thompson, supra*, the case in which the present defendant was tried and convicted of armed robberies committed at the Central Square Apartments, this Court found no error in the failure of the trial court to submit common law robbery as a possible verdict in that case. In that case, as in this one, the State's evidence showed that defendant and another man, each armed with a gun, committed the robberies. One of the State's witnesses, a victim of one robbery, testified on cross-examination that "I couldn't tell you if it was a toy pistol." In finding no error in the trial court's failure to submit common law robbery as a possible verdict in that case, the opinion of this Court pointed out that the State's witness expressed uncertainty only as to whether *one* of the guns employed by the robber might have been a toy but no uncertainty was expressed as to the other. On that basis the Court held that *State v. Bailey, supra* was not controlling in that case. In the present case some uncertainty, albeit minimal, was expressed by the State's witnesses as to whether both of the guns used were real or fake.

On authority of *State v. Bailey, supra*, we hold that the trial court in the present case committed error in failing to submit common law robbery as a possible verdict. For this error defendant must be awarded a

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New trial.

Judge HEDRICK concurs.

Judge ERWIN dissents.

Judge ERWIN dissenting.

I respectfully disagree with my scholarly colleagues of the majority in this case. I find no prejudicial error in the trial of the defendant and vote "no error." The majority held on authority of *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), that the trial court in this case committed error in failing to submit common law robbery as a possible verdict for the jury to consider and awarded defendant a new trial. Common law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction for common law robbery. Where there is evidence of defendant's guilt of common law robbery, it is error for the court to fail to submit the lesser offense to the jury. *State v. Bailey, supra*; *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955); *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954); *State v. Keller*, 214 N.C. 447, 199 S.E. 620 (1938); *State v. Faulkner*, 5 N.C. App. 113, 168 S.E. 2d 9 (1969). *The presence of such evidence is the determinative factor in each case.* The record does not reveal such evidence in this case. All three victims of this robbery, Myra Wright, Beverly Shinn, and J. M. Lamond testified as State's witnesses on direct examination that defendant used a chrome pistol, and his companion used a sawed-off shotgun to commit the robbery. In my opinion, there was no evidence of probative value before the trial court on the lesser included offense of common law robbery.

The record shows that on cross-examination, Myra Wright testified:

"As to whether it is true that I don't know whether the shotgun about which I have testified was a real gun, a fake gun, a toy gun, or what kind of gun, whatever kind of gun it was, *it was metal and did not look like a toy.* No, I don't know that it wasn't a toy gun. No, I don't know whether it was a fake gun, either. With respect to the pistol about

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which I have testified, *it was metal and did not look like a toy*. I do not know whether it was real or whether it was a toy. It was shiny like chrome." (Emphasis added.)

On cross-examination, J. M. Lamond testified:

"With respect to the pistol, I don't know whether it was a real pistol, fake pistol, or what kind of pistol. *It looked very real. It was not a cap pistol.*" (Emphasis added.)

I note the record does not reveal that Beverly Shinn had any uncertainty about the shotgun in question.

The record does not show sufficient conflict or uncertainty of the character of the weapons used to require the trial court to charge on the lesser included offense of common law robbery. In *Bailey*, defendant testified and denied any recollection of the alleged robbery or the possession by him of a pistol. This, in my opinion, created the conflict in the evidence along with the testimony of Loretta Williams, who stated on cross-examination that she did not know whether it was a "real or toy pistol." Such is not the case before us. The majority, relying on *Bailey*, would require victims of robberies to make an inspection of the weapons used to be able to testify whether or not the weapons were in fact real. I do not feel that such was the intent of *Bailey*.

I respectfully dissent.

SUSAN W. (HARTSOG) BULLOCK, EXECUTRIX OF THE ESTATE OF RALPH HARTSOG
v. THE INSURANCE COMPANY OF NORTH AMERICA

SUSAN W. (HARTSOG) BULLOCK, EXECUTRIX OF THE ESTATE OF RALPH HARTSOG
v. MURRAY M. WHITE, JR., MURRAY M. WHITE, INC., A CORPORATION,
AND INSURANCE COMPANY OF NORTH AMERICA

No. 7818SC145

(Filed 16 January 1979)

1. Evidence. §§ 22, 33— evidence at former trial—no opportunity to cross-examine witness—evidence properly excluded on retrial

In the second trial of an action to recover under an insurance policy issued by defendant where defendant contended that the policy was not in ef-

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fect at the time of the plane crash because the insured named in the policy did not possess an insurable interest in the airplane, testimony by a witness, who was an employee of the seller, at the first trial as to what the pilot of the plane told him would have been admissible at the second trial and would not have been excluded as hearsay, since the pilot's statement was not offered to prove the truth of the matter asserted therein, i.e., whether the pilot was going to fly the airplane or in fact made the flight, but instead the statement that the pilot "was going to fly his schedule" was offered as tending to show his intent to take the airplane for his normal use as pilot for his employer, and his intent at that time was relevant in determining whether the manner in which he took possession was such as would work a transfer of ownership and of an insurable interest; however, the trial court correctly excluded a transcript of the former testimony during the second trial since, at the first trial, the testimony was placed in the record after defendants' objection was sustained, and the defendants therefore did not have a *reasonable* opportunity to cross-examine the witness at the former trial.

2. Rules of Civil Procedure § 26— no finding that deponent dead—deposition properly excluded

In the absence of a finding that the deponent was dead, the trial court did not err in excluding portions of the deposition in question. G.S. 1A-1, Rule 26(d).

3. Insurance § 147.1— aviation liability insurance—erroneous instruction

In an action to recover under an insurance policy where the evidence tended to show that plaintiff's testator's employer negotiated with Air Services to buy an airplane and obtained insurance on that plane, but the crash in question occurred while the insured plane was being repaired and plaintiff was flying in a replacement plane supplied by Air Services, the trial court erred in allowing the jury to consider evidence that Air Services had purchased insurance covering the plane which crashed in determining whether testator's employer had an insurable interest in the plane which was being repaired, since there was no logical nexus between the two facts.

APPEAL by plaintiff from *Browning, Judge*. Judgment entered 15 August 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals sitting in Winston-Salem 15 November 1978.

This action was originally brought by the representatives of the estates of four deceased employees of Knit-Away, Inc., who were killed in an airplane crash. The plaintiffs sought to recover benefits under an insurance policy issued by the defendant, The Insurance Company of North America [hereinafter "INA"]. INA denied its liability under the policy. It contended that the policy was not in effect at the time of the crash because the insured named in the policy did not possess an insurable interest in the

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airplane. A trial was held and, at the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict. The trial court granted the motion and the plaintiffs appealed. This Court found that the plaintiffs had presented sufficient evidence to overcome the motion for a directed verdict and reversed the judgment of the trial court. *Norris v. Insurance Co.*, 26 N.C. App. 91, 215 S.E. 2d 379 (1975).

Prior to the case again being called for trial, three of the plaintiffs entered into a settlement with INA. The remaining plaintiff, Susan W. (Hartsog) Bullock, executrix of the estate of Ralph Hartsog, continued to trial. An additional action which she had initiated against the defendant Murray M. White, Inc., the agency which had sold the policy, and the defendant Murray M. White, Jr., the individual agent who had handled the transaction, was consolidated for trial with the prior action. At the close of the plaintiff's evidence, the trial court granted a directed verdict in favor of Murray M. White, Jr., the individual insurance agent. The plaintiff did not except. At the close of all of the evidence, the jury received its instructions from the trial court and thereafter returned a verdict in favor of the defendants. Judgment was entered in accordance with the verdict and, from the entry of that judgment, the plaintiff appealed.

The plaintiff presented evidence at the second trial tending to show that, during late August of 1971, Knit-Away, Inc., began negotiating with Air Service, Inc., for the purchase of an airplane. It was decided that Richard Bruce, the president of Knit-Away, would purchase an airplane and lease it to Knit-Away. On 14 October 1971, Air Service completed a purchase order for an aircraft described therein as a Model 58 Baron Beechcraft bearing F.A.A. Registration No. N9280Q. The purchase price was \$116,650. Bruce signed the purchase order on 21 October 1971 and gave Air Service his personal check for \$5,000. The airplane was then in the possession of Air Service. Bruce left the airplane with Air Service in order that additional equipment could be installed. Air Service indicated that the airplane would be ready on 24 November 1971. Bruce contacted the defendant, Murray M. White, Jr., to arrange for insurance coverage to begin at that time. White in turn contacted the defendant INA which issued a policy that indicated on its face that it was effective from 24 November 1971 to 24 November 1972. The policy covered a 1972

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Beechcraft Baron N9280Q [hereinafter "N9280Q"]. In addition to coverage for N9280Q, the policy provided coverage for substitute aircraft as specified in paragraph 10 of the policy:

While the aircraft described in this policy is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded under Coverages D, E, F, G and H of this policy with respect to another fixed wing aircraft, certified by the Federal Aviation Agency and of no greater seating capacity, not owned by the named insured, while temporarily used as the substitute for such aircraft.

The policy provided protection against liability claims and against damage to the airplane itself. It also contained an admitted liability endorsement which, in effect, allowed the estate of a passenger killed in an aircraft covered by the policy to accept a specified amount as a death benefit in lieu of prosecuting a wrongful death claim based upon negligence.

On 24 November 1971, the date the insurance policy was to become effective, Air Service had not completed installation of the additional equipment in N9280Q, and the airplane remained in the possession of Air Service. On 6 December 1971, Marshall Parker, an employee of Knit-Away who had been hired to pilot N9280Q, was informed by an employee of Air Service that the airplane would be ready the following day. On 7 December 1971, Mr. Parker received N9280Q from Air Service and flew it away from the airport where it had been located since Bruce had signed the purchase order. At that time all requested equipment had been installed and no restrictions were placed upon Parker's use of the airplane. N9280Q was, however, again on the premises of Air Service on 9 December 1971. Air Service installed a radio master switch and modified a microphone circuit in N9280Q on 10 December 1971. The radio master switch was not a part of the originally requested equipment and the circuit had to be modified in order to accept Parker's personal microphone. While this work was being done, Air Service loaned its 1962 Beechcraft Baron N4877J [hereinafter "N4877J"] to Knit-Away. On 13 December 1971, Parker was flying N4877J when it crashed killing the plaintiff's testator Ralph Hartsog, two other employees of Knit-Away and Parker.

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The defendant presented evidence tending to show that Bruce, the president of Knit-Away, had secured a commitment from a bank to finance the purchase of N9280Q but had never consummated the loan. The defendants also presented evidence tending to show that Bruce did not list N9280Q as an asset on a financial statement which he signed after the crash of N4877J.

Additional facts pertinent to this appeal are hereinafter set forth.

Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James, John R. Kernodle and Norman B. Smith, for plaintiff appellant.

W. F. Maready, James H. Kelly, Jr., and W. Thompson Comerford, Jr., for defendant appellee The Insurance Company of North America.

Teague, Johnson, Patterson, Diltthey & Clay, by Grady S. Patterson, Jr., Robert W. Sumner, and Alene Mercer, for defendant appellee Murray M. White, Inc.

MITCHELL, Judge.

The plaintiff assigns as error the failure of the trial court to allow her to introduce into evidence portions of a deposition of Richard Austin, an employee of Air Service, and portions of the testimony of Austin given at the former trial of this action. Prior to the first trial of this action, a deposition of Austin was taken. Both the plaintiff and the defendant INA were represented by counsel at the taking of Austin's deposition, but the defendants Murray M. White, Inc., and Murray M. White, Jr., were not. During the taking of his deposition, Austin was asked whether he had personal knowledge as to why N9280Q was removed from the premises of Air Service on 6 or 7 December 1971. Austin replied, "To my knowledge, it was the intention of the pilot to place the airplane in service." When asked whether his answer was based upon personal knowledge, Austin explained, "Marshall Parker took the airplane and told me he was going to fly his schedule the next day in the airplane."

Thereafter, during the first trial, Austin was asked on direct examination by the plaintiffs whether Parker had made any

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statement with respect to his intentions to use N9280Q. The defendants' objection to this question was sustained. Austin was then allowed to answer the question for the record and out of the presence of the jury. He responded, "Mr. Parker told me when he left Greensboro on Tuesday afternoon he was going to fly his trip in the airplane the next morning."

Austin apparently died at sometime between the first trial and the second trial which resulted in this appeal. Therefore, it was necessary for the plaintiff to read a transcript of Austin's former testimony into evidence at the second trial in order to introduce evidence of certain facts known only to Austin. The trial court allowed the plaintiff to read most of the transcript of Austin's former testimony but ruled that the portion of the transcript which dealt with Parker's statement to Austin was inadmissible. The trial court also ruled that evidence to the same effect in Austin's deposition was inadmissible. The plaintiff excepted to these rulings.

[1] In order to determine the correctness of these rulings by the trial court, we must first determine whether the pilot Parker's statement to Austin would have been admissible had Austin been present and testified at the second trial. The defendants contend that the hearsay rule prohibited Austin from giving testimony concerning Parker's statement. We do not agree.

A statement is hearsay evidence if it was made out of court by someone other than the witness testifying and is used to prove the truth of the matter asserted within the statement. McCormick, Evidence § 246 at 584 (2d ed. 1972). Even though a statement is made out of court by someone other than the witness, however, it is not hearsay if used to prove anything other than the matter asserted in the statement. 1 Stansbury's N.C. Evidence, §§ 138, 141 (Brandis Rev. 1973); 6 Wigmore, Evidence § 1766 (Chadbourn Rev. 1976); McCormick, Evidence, § 249 (2d ed. 1972). The hearsay rule does not apply to testimony of an out-of-court statement by one other than the witness testifying when the testimony is offered as proof that the statement was in fact made rather than as proof of the truth of the facts asserted in the statement. *Wilson v. Indemnity Co.*, 272 N.C. 183, 158 S.E. 2d 1 (1967); *In re Will of Duke*, 241 N.C. 344, 85 S.E. 2d 332 (1955);

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State v. Dilliard, 223 N.C. 446, 27 S.E. 2d 85 (1943); *State v. Grif-fis*, 25 N.C. 504 (1843).

Here, Parker's statement was not offered to prove the truth of the matter asserted therein. It was offered instead to prove that, when possession of N9280Q was transferred from Air Service to Parker, the transfer was not for the purpose of a test flight but a delivery of the airplane for normal use. That is to say, Parker's statement was not being used to show whether he was going to fly the airplane or in fact made the flight. Rather, the statement that "he was going to fly his schedule" was offered as tending to show his manifest intent at the time he took possession of the airplane that he take that possession for his normal use as pilot for Knit-Away. His intent at that time was relevant in determining whether the manner in which he took possession was such as would work a transfer of ownership and of an insurable interest. If the airplane was delivered to Parker at the time he made the statement, his subsequent actions or statements concerning the airplane would not make testimony as to that statement inadmissible, as Parker could not later revoke a prior transfer of ownership by deciding not to make the flight. Therefore, Austin could have testified to Parker's statement at the time Parker accepted the airplane without violating the hearsay rule.

Having determined that Austin's testimony as to Parker's statement would have been competent had Austin been available to testify, we must consider whether that testimony was competent when presented in the form of Austin's testimony admitted at a former trial. One requirement for the admission of former testimony is that the party against whom the testimony is offered or a like party in interest must have had a reasonable opportunity to cross-examine the witness at the former trial. *Bank v. Motor Co.*, 216 N.C. 432, 5 S.E. 2d 318 (1939). Although actual cross-examination is not unnecessary, the decision not to cross-examine must be meaningful in light of the circumstances which prevailed when the former testimony was offered. McCormick, Evidence, § 255 at 616 (2d ed. 1972). During the first trial the defendants objected to Austin's testimony concerning Parker's statement. After the objection was sustained, the plaintiffs asked that the answer of the witness be admitted for the record. When the answer was admitted for this purpose only, the defendants had no reason to

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cross-examine Austin. The defendants' objection had already been sustained and the testimony was not admitted into evidence before the jury. Under these circumstances, the defendants did not refrain from cross-examining Austin for tactical purposes. Rather, the fact that the testimony had already been ruled inadmissible made cross-examination purposeless. Therefore, neither the defendant nor a like party in interest had a *reasonable* opportunity to meaningfully cross-examine the witness at the former trial, and the trial court correctly excluded the former testimony during the second trial.

[2] The admissibility of a deposition is, however, governed by other rules. A deposition may be used against any party who was present or represented at the taking of the deposition if the court finds that the deponent is dead. G.S. 1A-1, Rule 26(d). Parker's statement as related by Austin in his deposition would, therefore, have been admissible if the trial court had found that Austin was dead at the time of trial. However, as no such finding appears in the record on appeal, we cannot say that the trial court erred in excluding from evidence the portions of Austin's deposition in question.

The plaintiff next assigns as error the failure of the trial court to admit into evidence one sentence of a memorandum prepared by Air Service which states: "We have sold Baron N9280Q to Mr. Dick Bruce of Knit-Away, Inc., Raeford, North Carolina." During the first trial of this action, the plaintiff sought to introduce this evidence during the testimony of Austin. At the second trial, that portion of Austin's former testimony which had been admitted into evidence at the first trial was read to the jury, but that portion of his testimony which was excluded at the first trial, including the quoted portion of the memorandum in question, was not admitted into evidence. Although a statement made by the plaintiff's attorney at the first trial seeking to have the entire memorandum admitted into evidence was read into the record during the second trial, the plaintiff did not properly seek to have the quoted portion of the memorandum in question introduced during the second trial. Therefore, there was no adverse ruling upon the admissibility of this evidence at the second trial, and the plaintiff has no ground upon which to base this assignment of error. The assignment of error is overruled.

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[3] The plaintiff additionally assigns as error the trial court's instruction to the jury that it could consider evidence that the crashed airplane N4877J was insured at the time of the crash for the purpose of determining whether Bruce, the president of Knit-Away, had an insurable interest in N9280Q. In this regard, the trial court instructed the jury that:

As I instructed you, Mr. Bruce and/or Knit-Away must have had an insurable interest in the airplane 9280Q for the policy of insurance under which the plaintiff seeks to recover to have been effective on the date of the crash. In addition to determining whether Mr. Bruce owned the airplane 9280Q on the date of the crash; that is, December the 13th, 1971, which would have given him an insurable interest in the aircraft, you may also consider the evidence that the aircraft number N4877J was insured with a policy of insurance at the time of the crash solely for the purpose of determining whether Mr. Bruce of Knit-Away had an insurable interest in the aircraft 9280Q.

In support of her assignment of error, the plaintiff contends that the charge was erroneous, as evidence of an insurance policy covering N4877J is not logically relevant to a determination of whether Bruce had an insurable interest in N9280Q. We agree.

During the second trial, Murray M. White, Jr., testified that Air Service had purchased an insurance policy covering N4877J which crashed. Although this evidence might have been relevant for other purposes, it did not tend to establish or negate the fact that Bruce had an insurable interest in N9280Q. Air Service's right to insure N4877J which crashed was completely independent of Bruce's right to insure the plane which he was purchasing. The fact that Air Service purchased insurance covering N4877J might tend to show that Air Service had a property interest in that airplane or that they wished to protect themselves from liability arising out of its operation or maintenance. However, such evidence did not tend to establish or negate the possibility that Bruce had an insurable interest in N9280Q, an entirely different piece of property. There simply is no logical nexus between evidence that N4877J was insured at the time of the crash and the possession *vel non* by Bruce of an insurable interest in N9280Q. Therefore, the quoted portion of the trial court's instructions to the jury constituted error.

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We cannot say that the error in the trial court's instructions was harmless. As the trial court allowed the jury to consider evidence of one fact to determine the existence or nonexistence of another when no logical nexus existed between the two, the jury's determination of the issues submitted to them may have been based upon the improper consideration of evidence of the existence of another policy of insurance on N4877J which crashed. In our view this could have had a substantial impact influencing the outcome of the case. As we find the challenged portion of the instructions to the jury both erroneous and prejudicial, a new trial will be required.

We note that the plaintiff did not except to the trial court's judgment dismissing the action against Murray M. White, Jr., individually, and that judgment is not before us for review on appeal. The plaintiff has presented other assignments of error, however, which we find it unnecessary to discuss here as they are not likely to arise should this case be tried again.

For the reasons previously indicated, the judgment is vacated and the cause remanded for a

New trial.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. McDONALD GURGANUS

No. 787SC762

(Filed 16 January 1979)

1. Constitutional Law §§ 20, 28— gender based classifications—tests for compliance with Fourteenth Amendment

The test controlling in cases involving constitutional challenges to gender based classifications applied by the states compels any statute or other state action to meet two requirements prior to being found permissible and consistent with the Fourteenth Amendment: (1) the classification by gender must serve "important" governmental objectives, and (2) the classification by gender must be "substantially" related to achievement of those objectives.

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2. Assault and Battery § 18.1; Constitutional Law § 28—assault on female—gender based classification—no denial of equal protection

G.S. 14-33(b)(2), providing for sentence of a fine and /or up to two years imprisonment for assault by a male over eighteen upon a female, does not deny males equal protection of law in violation of the Fourteenth Amendment, since the protection of the physical integrity of the citizens of the state is an important governmental objective, and the statute is substantially related to achievement of that objective, as the average adult male is taller, heavier and possesses greater body strength than the average female, and the General Assembly could reasonably conclude that assaults by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females.

3. Constitutional Law § 28— age classifications—no denial of equal protection

The classifications based upon age found in G.S. 14-33(b)(2) do not violate the Fourteenth Amendment.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 6 June 1978 in Superior Court, NASH County. Heard in the Court of Appeals 29 November 1978.

The defendant, McDonald Gurganus, was charged by warrant with the misdemeanor of assault on a female, he being a male person over the age of eighteen years, in violation of G.S. 14-33(b)(2). The defendant was found guilty as charged in the District Court Division and appealed to the Superior Court Division. Upon his trial de novo in the Superior Court Division the defendant pled not guilty. The jury returned a verdict of guilty as charged, and the trial court sentenced the defendant to a term of imprisonment of eighteen months. From this verdict and judgment, the defendant brought this appeal.

The State offered evidence tending to show that Mrs. Linda Gurganus, the wife of defendant, took her twelve-year-old daughter and eight-year-old son to a skating rink in Rocky Mount at approximately 7:30 p.m. on 29 March 1977. At that time she and the defendant were living separate and apart and were involved in a civil action in which she sought a divorce and child support. When Mrs. Gurganus and the children had been in the skating rink approximately fifteen minutes, the defendant, a thirty-six-year-old male person, entered. The defendant made a comment to his wife about being at the rink to show her "a-s-s off." She asked the defendant not to cause trouble or embarrass the family. At that point the defendant kicked Mrs. Gurganus in

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the left leg and started to leave. He was wearing "regular dress shoes." The defendant, having started to leave, returned and asked Mrs. Gurganus for some tax papers. She told him that he had all of the copies of the papers but one, and he slapped her on the left cheek with his hand and left the rink.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Spruill, Trotter & Lane, by N. K. Falk, for defendant appellant.

MITCHELL, Judge.

The defendant contends that G.S. 14-33(b)(2) arbitrarily discriminates against him on the basis of his sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In support of this contention, the defendant correctly points out that he has received a greater sentence of imprisonment as a male for assaulting a female than that permitted by statute in cases involving an otherwise identical assault by a female upon a male or upon another female. For reasons hereinafter set forth, we find the statute does not deny the defendant "the equal protection of the laws" in violation of the Fourteenth Amendment.

The authority of the courts of this State to declare an act of the General Assembly unconstitutional was established in *Bayard v. Singleton*, 1 N.C. 5 (1787). In *Bayard*, North Carolina adopted the doctrine of judicial review, which was to be later adopted by the Supreme Court of the United States in *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). Should a conflict arise between a statute and the Constitution, our courts must decide the issues presented in the case before them in accordance with the Constitution, as it is the superior rule of law in such situations. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969); *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 243 S.E. 2d 793 (1978). With these rules in mind, we undertake an analysis of the constitutional issues presented by the present case.

In passing upon questions involving gender based classifications, the Supreme Court of the United States has apparently

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adopted "an intermediate standard of scrutiny in equal protection analysis, more deferential than the 'strict scrutiny' exercised in challenges to suspect classifications and classifications impinging on fundamental rights, but more exacting than the 'rational basis' test traditionally applied to economic and social welfare legislation." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 177 (1977) [hereinafter "*The Supreme Court*"]. In *Craig v. Boren*, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451, *reh. den.*, 429 U.S. 1124, 51 L.Ed. 2d 574, 97 S.Ct. 1161 (1976), Mr. Justice Brennan delivered the opinion of the Court requiring that: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. A majority of the Court joined in the opinion with each member filing a separate concurring opinion.

It has been stated that Mr. Justice Brennan's opinion in *Craig* did not specifically call for a "middle tier" of scrutiny. *The Supreme Court*, 178. The opinions of the other members of the Court forming the majority in that case, however, indicated that they were of the opinion that the case established just such a "middle tier." We concur in this view. The "middle tier" level of scrutiny set forth in *Craig* has been since reaffirmed and is for the present fully applicable to cases involving attacks upon gender based classifications. *Califano v. Goldfarb*, 430 U.S. 199, 51 L.Ed. 2d 270, 97 S.Ct. 1021 (1977). Although there is little agreement by the commentators that the *Craig* test is necessarily the best test to be employed in cases of alleged discrimination on the basis of sex, there does appear to be general agreement that it is the currently controlling test. Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. Rev. 1, 11 (1978) [hereinafter "Loewy"]; *The Supreme Court*, 177-88.

The commentators have also contended that, in addition to the test stated in *Craig*, the Court has allowed a generally unstated element of "reverse discrimination" against men in their capacity as a dominant group to influence its opinions. Loewy, 11-22 (1978); *cf. Califano v. Webster*, 430 U.S. 313, 51 L.Ed. 2d 360, 97 S.Ct. 1192 (1977) (upholding gender based classification "deliberately enacted to compensate for particular economic disabilities suffered by women.") These and other facets presented by the evolving law of equal protection have prompted one commentator to yield to an apparent sense of some frustra-

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tion and to state that: "Surely we are near the point of maximum incoherence of equal protection doctrine." Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 3 (1977).

[1, 2] Despite the existence of certain areas of uncertainty which will require further clarification by the Supreme Court of the United States, we find the test set forth in *Craig* and reiterated in *Goldfarb* to be controlling in cases involving constitutional challenges to gender based classifications applied by the States. That test compels any statute or other "state action" to meet two requirements prior to being found permissible and consistent with the Fourteenth Amendment. First, the classification by gender must serve "important" governmental objectives. Second, the classification by gender must be "substantially" related to achievement of those objectives. We find that G.S. 14-33(b)(2) meets both these requirements and is in no way violative of the letter or spirit of the Fourteenth Amendment.

In passing upon the constitutionality of the challenged subsection of the statute, we do not examine it in isolation. Instead, the challenged subsection must be viewed in context and as a part of the entire and integrated whole of the statute in which it is found. G.S. 14-33, in its entirety, prohibits varying types of assault, batteries and affrays as follows:

§ 14-33. *Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.*—(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or imprisonment for not more than 30 days.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

- (1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon; or

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- (2) Assaults a female, he being a male person over the age of 18 years; or
- (3) Assaults a child under the age of 12 years; or
- (4) Assaults a law-enforcement officer or a custodial officer of the State Department of Correction, while the officer is discharging or attempting to discharge a duty of his office.

The statute in its entirety provides a logical pattern protecting the citizens of North Carolina from acts of violence. Subsection (a) of the statute establishes the crimes of assault, assault and battery and affray. Subsection (b) and its subsections do not create additional or separate offenses. Instead, those subsections provide for differing punishments when the presence or absence of certain factors is established. *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967); *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962); *State v. Beam*, 255 N.C. 347, 121 S.E. 2d 558 (1961); *State v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861 (1958); *State v. Jackson*, 226 N.C. 66, 36 S.E. 2d 706 (1946); *State v. Smith*, 157 N.C. 578, 72 S.E. 853 (1911). Although not elements of the crimes prohibited, these factors must be shown to exist in order for the evidence to support a judgment imposing one of the greater sentences provided. *State v. Grimes*, 226 N.C. 523, 39 S.E. 2d 394 (1946).

In adopting G.S. 14-33, the General Assembly of North Carolina clearly sought to prevent bodily injury to the citizens of the State arising from assaults, batteries and affrays. The protection of the physical integrity of the citizens of the State is *an* important governmental objective. It is not only *an* important governmental objective; it is *the* most important and fundamental objective of government. Without such protection there can be neither government nor civilization.

We must additionally determine, however, whether subsection (b)(2) of the statute, providing for imprisonment for a period of as much as two years in cases of assaults upon females by males over eighteen years of age but providing for a maximum term of imprisonment of not more than thirty days in most other cases of simple assault, is "substantially" related to achievement of the objective of physical integrity of the citizens of the State.

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We find that the subsection is substantially related to this important objective.

In reaching this conclusion, we do not find it necessary to rely upon the numerous works documenting and attempting to quantify various social factors and which tend to establish that men, particularly in conjugal settings, assault women more frequently and more violently than women assault men, while women more frequently submit to such violence. See, e.g., T. DAVIDSON, *CONJUGAL CRIME* (1978); *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* (M. Roy Ed. 1977); S. ROWBOTHAM, *WOMEN, RESISTANCE AND REVOLUTION IN THE MODERN WORLD* (1973); H. TOCH, *VIOLENT MEN: AN INQUIRY INTO THE PSYCHOLOGY OF VIOLENCE* (1969). We base our decision instead upon the demonstrable and observable fact that the average adult male is taller, heavier and possesses greater body strength than the average female. See *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed. 2d 786, 97 S.Ct. 2720 (1977). We take judicial notice of these physiological facts, and think that the General Assembly was also entitled to take note of the differing physical sizes and strengths of the sexes. Having noted such facts, the General Assembly could reasonably conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment.

We recognize that classifications based upon average physical differences between the sexes could be invalid in certain situations involving equal employment opportunity, participation in sports and other areas. *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed. 2d 786, 97 S.Ct. 2720 (1977); 15 Am. Jur., Civil Rights, § 170, p. 659; Annot., 26 A.L.R. Fed. 13 (1976); Annot., 66 A.L.R. 3d 1262 (1975); Annot., 23 A.L.R. Fed. 664 (1975). We believe that an analytical approach taking into account such average differences is an entirely valid approach, however, when distinguishing classes of direct physical violence. This is particularly true where, as here, the acts of violence classified are all criminal when engaged in by any person whatsoever and have no arguably pro-

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ductive end. See *Hall v. McKenzie*, 537 F. 2d 1232 (4th Cir. 1976). Certainly some individual females are larger, stronger and more violent than many males. The General Assembly is not, however, required by the Fourteenth Amendment to modify criminal statutes which have met the test of time in order to make specific provisions for any such individuals. The Constitution of the United States has not altered certain virtually immutable facts of nature, and the General Assembly of North Carolina is not required to undertake to alter those facts. G.S. 14-33(b)(2) establishes classifications by gender which serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, we hold that the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States.

[3] Although not specifically raised by the defendant, we note that the challenged subsection of the statute also distinguishes between males over the age of eighteen years who participate in prohibited acts of violence and those eighteen years of age or younger who participate in such acts. Thus far, the Supreme Court of the United States has not held that age discrimination is "suspect." See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed. 2d 520, 96 S.Ct. 2562 (1976). Therefore, classifications by age are required to meet standards no higher than, and perhaps not so high as, those which must be met by gender based classifications. Thus, for the reasons previously set forth, we think that the classifications based upon age found in G.S. 14-33(b)(2) do not violate the Fourteenth Amendment. See *Hall v. McKenzie*, 537 F. 2d 1232 (4th Cir. 1976).

Counsel for the defendant has urged us to take into consideration certain matters which counsel contends arise in view of the pendency of the proposed "Equal Rights Amendment" to the Constitution. We think it would be signally ill-advised for us to establish any precedent tending to require that the courts of this State take into consideration the pendency of amendments to the Constitution which have been put forward by the Congress but have not been ratified by the required number of the States. Ample opportunities will arise for the consideration of such issues after proposed amendments have been ratified and become a part of the Constitution.

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The defendant has additionally presented assignments of error directed to the trial court's charge to the jury and to the sufficiency of the evidence to go to the jury. We have found these assignments to be without merit, and they are overruled.

The defendant received a fair trial free from prejudicial error, and we find

No error.

Judges CLARK and WEBB concur.

THE NORTHWESTERN BANK, TRUSTEE OF INTER VIVOS TRUST CREATED BY REUBEN B. ROBERTSON, DECEASED, PETITIONER v. LOGAN T. ROBERTSON, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF REUBEN B. ROBERTSON, DECEASED; AMERETTE ROBERTSON, A MINOR; LAURA LEE SAFFORD; RUFUS LASHER SAFFORD; RUFUS BRADFORD SAFFORD, A MINOR; GEORGE SCOTT SAFFORD, A MINOR; LILLIAN ROBERTSON SHINNICK; JOSEPH N. SHINNICK; ROBERTSON WILLIAM SHINNICK, A MINOR; LAURA ELIZABETH SHINNICK, A MINOR; LOGAN T. ROBERTSON, JR.; MARY NORBURN ROBERTSON; SCOTT A ROBERTSON, A MINOR; ASHLEY NICHOLETTE ROBERTSON, A MINOR; HOPE T. NORBURN; RICHARD A. FARMER; LAURA LEE FARMER, A MINOR; CYNTHIA ANN FARMER, A MINOR; RICHARD R. FARMER, A MINOR; CHARLES R. NORBURN; RUSSELL L. NORBURN, JR.; HELEN H. NORBURN; ROBERT E. NORBURN, A MINOR; CHRISTOPHER S. NORBURN, A MINOR; REUBEN B. ROBERTSON, III; DANIEL H. ROBERTSON; SARAH HOPE ROBERTSON, A MINOR; PETER T. ROBERTSON; MARGARET ROBERTSON WHITE LAFORCE; RICHARD LAFORCE, JR.; LAURENS T. WHITE, A MINOR; LOUISA H. ROBERTSON; GEORGE W. ROBERTSON; AND MAY HOLTZCLAW, RESPONDENTS

No. 7728SC917

(Filed 16 January 1979)

1. Rules of Civil Procedure § 60 — re-opening case—no relief from earlier judgment sought—Rule 60 inapplicable

Since petitioner did not seek relief from an earlier declaratory judgment action, G.S. 1A-1, Rule 60(b)(6) was not applicable to give the court authority to re-open the case, and the court, in entering the second judgment, went beyond correcting a clerical error in the first judgment and thus exceeded any authority vested in him by Rule 60(a); however, the judge did have authority under G.S. 1-259 to re-open the case for further relief.

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2. Trusts § 5.1— declaratory judgment ordering priorities—ambiguity and incompleteness

In a declaratory judgment proceeding where the first judgment ordered priorities for the distribution of trust assets and petitioner trustee sought to re-open the case for advice concerning distribution of the reduced assets of the trust, the trial court's second judgment which established an order of priority for payment of all "residual claims against the trust" was so ambiguous and incomplete as to leave the trustee to conjecture and speculation as to where substantial claims against the estate should be placed in the ordering of priorities.

3. Trusts § 5.1— judgment directing payment of assets—mandatory designation that interest be used

It is imperative that any judgment directing the application of assets comprising both principal and income interests of a trust to the payment of various claims against the estate designate that interest to be used in meeting any particular claim.

APPEAL by respondent, Logan T. Robertson, from *Martin, Judge (Harry C.)*. Judgment entered 10 June 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 22 August 1978.

This is a declaratory judgment proceeding instituted by petitioner, Northwestern Bank, pursuant to Chapter 1, Article 26 of the North Carolina General Statutes. The petition contains allegations to the following effect:

On 6 December 1971 Reuben B. Robertson established an inter vivos trust designating the petitioner as trustee. On 27 November 1972 the settlor "executed and forwarded to petitioner a new agreement purporting to amend and restate" the earlier agreement. The trust was further amended by a letter from the settlor to the petitioner dated 25 December 1972. The settlor died on 26 December 1972, leaving a will and five codicils. It is believed that the settlor left most of his property in trust with petitioner and the value thereof exceeds \$1,300,000.00. The executor of the settlor's will has informed the petitioner that the assets of the estate are insufficient to pay the specific bequests under the will, the federal and state taxes, and the costs of administration.

On the basis of these allegations the petitioner sought the court's interpretation of the various instruments concerned and submitted specific questions concerning its fiduciary duties as trustee.

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The trust agreement, as amended on 27 November 1972, is summarized and quoted in pertinent part as follows: During the settlor's life the trustee shall pay to him the entire net income of the trust. Following his death the trustee shall pay to Asheville Orthopedic Hospital, Inc., the sum of \$50,000; to May Holtzelaw, a former employee of the settlor, an annuity of \$200 per month for the remainder of her life; to Logan T. Robertson, the settlor's son, the entire net income of the trust for life; and to the four children of Logan Robertson the residue of the trust in sums of equal amounts.

ARTICLE EIGHT

The TRUSTEE shall pay to the SETTLOR'S Executors or Administrators, upon the request of such Executors of [sic] Administrators, such sum or sums out of the principal of this Trust as the SETTLOR'S Executors or Administrators in their sole discretion shall determine to be necessary for the purpose of enabling such Executors or Administrators to pay all or any part of SETTLOR'S just debts, his funeral expenses, costs of administration of his estate and the inheritance and estate taxes payable upon or by reason of SETTLOR'S death;

...

The Settlor's son, Logan Robertson, is authorized "to withdraw from the principal of this trust the amount of \$275,000 or any lesser amount by written notice to the TRUSTEE."

In his letter written the day before his death, the settlor amended the foregoing trust agreement by directing the trustee to set aside \$400,000 to be invested by his son, Logan Robertson. The letter also included the following provision:

Paragraph #8 of the Trust Agreement dated November 27, 1972 is to be interpreted in such a fashion as to take maximum advantage of the tax laws of the United States and the State of North Carolina, but shall not be construed or interpreted as restricting the use and application of the assets of the trust for payments of my debts or the expenses of the administration.

The settlor's will was executed on 6 December 1971 and amended by five codicils. Therein the settlor made a specific bequest to the Robertson Memorial Young Men's Christian Associa-

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tion among others and left the residue of his estate to the inter vivos trust.

The trial court entered judgment in January, 1976, in which it declared the following:

4. The Trustee has authority to pay to or for the estate of Reuben B. Robertson, deceased, any and all Federal estate taxes, North Carolina inheritance taxes, specific bequests under the Will of Reuben B. Robertson, deceased, and all costs of administration.

5. The sum of \$400,000.00, referred to by amendment to the trust dated December 25, 1972, is reduced on a pro rata basis since the trust will pay all Federal estate and North Carolina inheritance taxes due by the estate of Reuben B. Robertson.

6. Since the Trustee is directed to pay from the trust the Federal estate and North Carolina inheritance taxes, specific bequests, and costs of administration, the right of withdrawal from the principal of the trust of \$275,000.00 by Dr. Logan T. Robertson, designated in Article IX of the Agreement dated November 27, 1972, is reduced on a pro rata basis.

7. The Trustee's direction to pay May Holtzclaw \$200.00 per month for life takes priority over the direction to pay Dr. Logan T. Robertson the entire net income of the trust during his lifetime.

8. The Codicil of Reuben B. Robertson dated September 26, 1972, giving to Robertson Memorial Y.M.C.A. of Canton the sum of \$35,000.00, supersedes—and not in addition to—Codicil dated March 24, 1972, in which Reuben B. Robertson bequeathed the Robertson Memorial Y.M.C.A. of Canton the sum of \$25,000.00.

No appeal was taken from this judgment.

Over a year later the petitioner submitted a request for further instructions in the form of a memorandum to "the Honorable Harry C. Martin, Superior Court Judge." In this memorandum the petitioner stated that since the entry of the judgment in the

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declaratory judgment proceeding taxes had been assessed against the estate, and that after payment of these taxes the liquid assets of the trust would be reduced to \$83,926. The petitioner alleged that it had insufficient funds with which to comply with the directions of the settlor and requested the "advice of the Court as to the disposition of the remaining assets in the trust estate."

At a hearing conducted on 23 March 1977 the trial court heard the testimony of a trust officer of petitioner. Based on this testimony the court found that "the Trustee has on hand, as of March 11, 1977, the sum of \$96,826.09, of which amount \$68,813.02 represents income received by the Trustee and which has not been distributed" and "that the Trustee has distributed no income to the beneficiaries under the trust since May 15, 1974." The court further found that the trustee is a holder of a note "secured by deed of trust, having a face value of said date of \$20,396.58, said note being payable over a period of time so that the actual cash value is probably less than the face value." The court then ordered "pursuant to Rule 60(b)(6)" that the "case is reopened for further instructions of the court."

In a judgment entered on 10 June 1977 the court concluded and ordered that the assets of the trust be applied in the following priority:

- (a) to the payment of any fiduciary income taxes or other taxes which may be lawfully due and to the payment of the costs of this proceeding;
- (b) to the cost of the administration of the estate and the Inter Vivos Trust of Reuben B. Robertson, deceased;
- (c) to the debts of the estate of Reuben B. Robertson, deceased;
- (d) to the specific bequests under the Inter Vivos Trust of Reuben B. Robertson, deceased;
- (e) to Logan T. Robertson, individually.

Respondent Logan T. Robertson, in his individual capacity, appealed.

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Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Albert L. Sneed, Jr., for the respondent appellees.

Pitts, Hugenschmidt & Krause, by James J. Hugenschmidt for respondent appellant Logan T. Robertson.

HEDRICK, Judge.

The appellant argues five assignments of error in his brief challenging in turn the priority of payment given each of the five classifications of claims against the settlor's estate in the judgment appealed from. At the foundation of each of these arguments is the contention that the trial court erred in failing to distinguish between principal and income in establishing these priorities.

On the other hand, the appellee contends that the first judgment of January, 1976, which was not appealed constitutes the law of the case, and that the second judgment does not add thereto except in its inclusion of debts in the third order of priority. The appellee argues that by law as well as by the intent of the deceased, debts of the estate must be afforded preferred status along with taxes and costs which were clearly provided for in the first judgment. Accordingly, the category of debts which was omitted from the first judgment by oversight could be inserted by the trial judge by authority of Rule 60(a).

At the outset we think it necessary to examine the appellee's contentions concerning the status of the first judgment and the procedural development of this case. The first judgment which was entered in January of 1976 purported to answer specific questions raised by the petitioner in its petition for declaratory judgment. As previously stated, none of the parties sought appellate review of this judgment. Without expressing any view as to the propriety of the trial judge's conclusions therein, we think the January 1976 judgment established the law which is binding on the parties to this proceeding. *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524 (1957). See also, *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Williams v. Herring*, 20 N.C. App. 183, 201 S.E. 2d 209 (1973).

[1] The case was re-opened upon the motion of the petitioner who sought further instructions supplementary to the January

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1976 judgment. Since petitioner was not seeking relief from that judgment, Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, upon which the trial judge relied in re-opening the case, is not applicable. Furthermore, as we shall point out, in entering the second judgment the trial judge went beyond correcting a clerical error in the first judgment, and thus, exceeded any authority vested in him under Rule 60(a). However, we do find authority in G.S. § 1-259 for the trial judge to re-open this case for "[f]urther relief based on a declaratory judgment or decree . . . whenever necessary or proper."

Consideration of the substantive aspects of this case entails an examination of the two judgments individually and in conjunction with one another. The first judgment, which we have found to be the law of the case, granted to the trustee in Paragraph 4 general authority to pay on behalf of the settlor's estate all "Federal estate taxes, North Carolina inheritance taxes, specific bequests under the Will of Reuben B. Robertson, deceased, and all costs of administration." Paragraph 6 directs the trustee to reduce the appellant's right of withdrawal from the principal of the trust of \$275,000.00 pro rata "[s]ince the Trustee is directed to pay from the trust the Federal estate and North Carolina inheritance taxes, specific bequests, and costs of administration." We think it is clear that the designation of "specific bequests" in this paragraph refers to Paragraph 4 which specifies "specific bequests under the Will" of the settlor. Moreover, the reference to taxes, specific bequests under the will, and costs of administration is implicit in Paragraph 5 in light of the trial judge's finding addressed to the same matter. In sum, while the language in the foregoing provisions is less than precise, in our opinion they establish the priority of taxes, specific bequests under the will and costs of administration over the appellant's right to invade the principal of the trust to the extent of \$275,000 for any purpose and to the extent of \$400,000 for investment purposes. The final provision with which we are concerned expressly grants priority to the annuity of \$200 per month for life to May Holtzclaw over the appellant's income interest under the trust agreement.

[2] In its motion seeking to re-open the case the petitioner enumerated its obligations under the trust agreement as well as its obligation pursuant to the first judgment to pay the specific

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bequest under the settlor's will to Robertson Memorial Y.M.C.A. It then requested instructions as to the disposition of its limited assets. In our opinion the judgment rendered was only partially responsive to petitioner's request. The judgment purports to provide guidance to the trustee by establishing an order of priority for payment of all "residual claims against the trust." However, the judgment omits any reference to "specific bequests under the will" which the trustee was authorized and directed to pay in the first judgment. Furthermore, in addition to adding the category of "debts" to the list of claims against the estate, the second judgment inserts a general category of "specific bequests under the trust" as fourth priority. This general category includes all specific bequests under the trust agreement not specifically included in the first judgment, notably the specific bequest to Asheville Orthopedic Hospital of \$50,000. While it is clear from the first judgment that the appellant's income interest has been subordinated to the annuity to May Holtzclaw, it is not at all clear as to the relative status of these bequests, the specific bequests under the trust to the appellant of the right to invade corpus, and the specific bequests under the will. In short, the second judgment is so ambiguous and incomplete as to leave the trustee to conjecture and speculation as to where substantial claims against the estate should be placed in the ordering of priorities.

[3] Finally, as the appellant contends, we think it imperative that any judgment directing the application of assets comprising both principal and income interests of a trust to the payment of various claims against the estate designate that interest to be used in meeting any particular claim. *See*, North Carolina Principal and Income Act of 1973, G.S. §§ 37-16 to -40. From our reading of the two judgments it appears that since the trial court clearly relegated the appellant's interest of the entire net income of the trust to the lowest order, it intended that the income be added to the corpus to pay all claims and that the appellant take any balance remaining after the payment thereof. However, if such was the intent of the trial judge we think he was bound to express it in more explicit terms, especially in view of Paragraph 8 of the trust agreement in which the settlor provides that taxes, debts, funeral expenses and costs of administration be paid from the principal of the trust.

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The key to the resolution of these questions is in the hands of the trial court. In construing the various instruments concerned in this case, it must attempt to ascertain the intent of the settlor with respect to the disposition of the limited assets among the various claims. *Callaham v. Newsom*, 251 N.C. 146, 110 S.E. 2d 802 (1959). This can be accomplished only by scrutinizing the several instruments with particular attention to Paragraph 8 of the trust agreement, as amended by the letter of 25 December 1972.

In our opinion, the following principles set forth in 46 Am. Jur. 2d, *Judgments*, § 67 (1969), are applicable to the case before us:

It is a fundamental rule that a judgment should be complete and certain in itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed, and so that the judgment is susceptible of enforcement in the manner provided by law. A failure to comply with this requirement may render a judgment void for uncertainty.

See also Gibson v. Insurance Co., 232 N.C. 712, 62 S.E. 2d 320 (1950); *Tucker v. Bank*, 204 N.C. 120, 167 S.E. 495 (1933); *Smothers v. Schlosser*, 2 N.C. App. 272, 163 S.E. 2d 127 (1968). As we have pointed out, the judgment appealed from which purports to establish the priority of payment of all claims against the estate omits claims of a substantial nature as well as leaving other matters unresolved. Thus, we do not think the parties to this action can with any certainty carry out its directives. Nor can we as an appellate court cure its infirmities. The judgment of 10 June 1977 is vacated and the cause remanded to the Superior Court for a new trial.

New trial.

Chief Judge MORRIS and Judge WEBB concur.

Kurtz v. Board of Education

JUDITH A. KURTZ, PETITIONER v. WINSTON-SALEM / FORSYTH COUNTY BOARD OF EDUCATION, AND OMEDA BREWER, BEAUFORT BAILEY, BETSY SAWYER, NANCY WOOTEN, DAVEY B. STALLINGS, TOM C. WOMBLE, WILLIAM SHEPPARD, AND MARVIN CALLOWAY, JR., IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WINSTON-SALEM / FORSYTH COUNTY BOARD OF EDUCATION, RESPONDENTS

No. 7721SC913

(Filed 16 January 1979)

1. Schools § 13.2— corporal punishment—policy of school board—no conflict with statute—violation of policy by teacher—dismissal

A school board's policy as to corporal punishment did not conflict with G.S. 115-146 which confers on teachers the power to use reasonable force to maintain order in the classroom and prohibits school boards from adopting policies which interfere with this right and duty, and the evidence was sufficient to support the court's determination that a probationary teacher violated the board's policy in punishing students by striking them about the head or grasping them so firmly about the arm as to leave a bruise.

2. Schools § 13.2— teacher dismissal hearing—private hearing

A school board was bound by the requirement of G.S. 115-142(j)(1) that a teacher dismissal hearing be private, and the teacher's constitutional rights were not violated by the board's failure to hold a public hearing at the meeting at which she was discharged.

APPEAL by petitioner from *Albright, Judge*. Judgment entered 30 June 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 August 1978.

In the fall of 1976, Judith A. Kurtz, the petitioner-appellant, was a probationary teacher in the Winston-Salem / Forsyth County School System. On 2 December 1976, the Superintendent of the Winston-Salem / Forsyth County School Board (referred to herein after as the Board) notified Mrs. Kurtz that he would recommend to the Board that she be dismissed as a teacher for the three following reasons: (1) Inadequate performance; (2) Insubordination, and (3) Failure to comply with a reasonable requirement that the Board had prescribed for the imposition of corporal punishment. Petitioner-appellant elected to bypass the Professional Review Committee and requested a hearing before the Board. The Board held a hearing lasting from 4:00 p.m. on 21 December 1976 until 2:45 a.m. on 22 December 1976. Extensive evidence was taken in regard to incidents between the petitioner-appellant and several

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of her students. For a full understanding of the decision in this case, it is necessary for us to recount the evidence in some detail.

Evidence

Terri Rhodes, a third grade student, testified:

"And Dwight, he came over there and pushed me. And then I pushed him and hit him back. And she [Mrs. Kurtz] came over there and put him in the back of the line. She came up there and slapped me.

* * *

[I]t was hard."

Ms. Betty Carter Williams, the principal of Hall-Woodward Elementary School testified:

"Mrs. Rhodes eventually came to my school. . . . [S]he came with . . . Terri and two other children. . . . I looked at it and saw fingerprints on the left side of Terri's face.

Mrs. Kurtz said to me that she slapped Terri, when I asked her about it, after Mrs. Rhodes called me. Mrs. Kurtz said something to me at that time about other children. She said that 'While we were at it, I might as well tell you, before some others call you, that there have been some other incidents. . . . I slapped some other children.' . . . She named Jay Davidson, Marshal Brady and James Winchester at that time."

Dr. James A. Adams, Superintendent of Winston-Salem / Forsyth County Schools testified:

"She indicated to me that she had slapped four youngsters and that she was having some personal problems in terms of a move to a new home. . . ."

Orlander Jay Davidson testified:

"the Monday, 22nd of November, . . . Mrs. Kurtz pinched me. She hit me on the head with a book and she slapped. . . . She pinched me on the arm. She pinched me kind of hard. She pinched me because I was talking on my way up. She slapped me because a boy named Marshal was teasing me. I

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was doing nothing to Marshal. She hit me on my face. She did not say anything to me before she hit me. She did not tell me what I was doing wrong. I have seen Mrs. Kurtz hit . . . Terri and Marshall the same day that she slapped me."

Lucy McAlexander testified:

"[My son] came home from school with some unusual marks on his arm. It was on his left arm, and it was above his elbow, and it was a thumb print and four fingers of bruises. I don't really know how long these marks remained on his arm; a couple of weeks, I guess. . . . I received a letter, . . . from Mrs. Kurtz which indicated that she admitted causing those marks. She sent me a letter of apology the day that my husband took James back to school; and showed Mr. Johnson the places on his arm."

Mr. Jack Johnson, the principal of Vienna School, testified:

"it was kind of bruised right under—A tiny bruise right under, right below his arm pit, on the inside of his arm. . . . I told him [Mr. McAlexander] I would talk with Mrs. Kurtz, and I did. And she agreed that she did squeeze the arm too hard. And she related to me that the children . . . were coming in from the playground. . . . And they were lining up at the door. And as some were running, they were pushing and scuffling. And she grabbed them, two or three by the arm, to set them straight in line."

Teresa Thomas testified about Monday, 22 November:

"Mrs. Kurtz smacked me in the face. . . . I hadn't put my pencil down when she asked me to put my pencil down.

* * *

As to whether it was a little tap, very hard, or not so hard, it was middle sized.

* * *

[O]n any day before that Monday, . . . she squeezed my arm. . . . As to whether she squeezed my arm hard or soft, she squeezed it middle.

* * *

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[I]t was to get me in line. . . . I do not ever remember her touching me with her fingers.

* * *

I did see Mrs. Kurtz hit or slap or touch some of the other students about the face and head. She smacked Terri, James, and Marshal."

Petitioner-appellant testified:

"Both Ms. Williams and Dr. Adams says—say that I said, I slapped five children. And I'm telling you here today, that I did not slap five children. Anyone—once you've slapped one child once, you know it. And you'll never forget it. I told them that I handled four other children in some way physically I had to touch them or move them about the room. I never said I slapped five children. And this was a misunderstanding. And I feel very badly that I'm contradicting what two other people say. But I don't believe—I said I handled them in some way physically."

As to Terri Rhodes, petitioner-appellant testified:

"She stated that I took Dwight by the arm and moved him to the end of the line. I deny that I moved him to the end. I moved him back about three or four children from where she was. That was the first action I took to the best of my recollection.

Then I came back. I don't recall if I said anything to Terri at that time. It all happened [sic] so fast. There was just, the indication she gave me was that she was just not going to stop, and that she wasn't going to stand still. And I thought it just essential that she do so then.

* * *

I heard the testimony of Terri. She testified that I smacked her; I call it popping her on the cheek. I took my hand and popped her on the side of the cheek so she'd stop."

As to Jay Davidson, petitioner-appellant testified:

"I heard the testimony of Jay Davidson. I deny that I slapped him. I tapped him on the back of his forehead with two

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fingers. And I tapped him on the side of his head with a book, but not hard. And these were merely attention getting devices rather than disciplinary action, in the case of Jay."

Petitioner-appellant also testified:

"There's been some allegations that I grabbed James McAlexander and Teresa Thomas. And on both of these occasions, the students or their parents testified that there were marks or bruises left. I do not have any explanation for the amount of force that I used. As to why these students would have bruises on their arms, they were fighting and I just got them firmly by the arm and put them in line, basically."

As to James McAlexander, petitioner-appellant testified that on one occasion she had to grab him by the arm. She said:

"And three boys, when they came up near the door, and when they got to the line were fighting as they came up to the door. And so I just took them firmly by the arm and put them in the line, and said, 'I don't want any more fighting.'"

At the conclusion of the hearing the Board made findings of inadequate performance and insubordination on the part of the petitioner-appellant. The Board also found that petitioner-appellant had failed to comply with the reasonable requirement the Board had prescribed for the imposition of corporal punishment. This finding was based on findings that the petitioner-appellant had struck students Terri Rhodes and Jay Davidson about the face and head, had grabbed James McAlexander with such force as to bruise his arm and had struck or grabbed students Teresa Thomas and Terri Rhodes on another occasion. The Board ordered that Mrs. Kurtz be dismissed from her employment as a teacher with due consideration given to her application should she reapply for a teaching position for the 1977-1978 school year.

Petitioner appealed to the superior court. The superior court held the findings of the Board relating to inadequate performance and insubordination were not supported by substantial evidence in view of the entire record and overruled them. The superior court held that the findings and conclusions in regard to the corporal punishment administered by the petitioner-appellant to her students were supported by material and substantial evidence in

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view of the entire record and affirmed these findings and conclusions. The superior court affirmed the dismissal of Mrs. Kurtz from her position as a probationary teacher with the Winston-Salem / Forsyth County School System.

William G. Pfefferkorn and Jim D. Cooley, for petitioner-appellant.

Hudson, Petree, Stockton, Stockton and Robinson, by W. F. Maready and George L. Little, Jr., for defendant appellees.

WEBB, Judge.

[1] Petitioner-appellant brings forward several arguments as to why the superior court should be reversed. She contends first that the Board's policy in regard to corporal punishment is in conflict with state law. G.S. 115-146 provides in part:

Principals, teachers, . . . in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No county or city board of education or district committee shall promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

The Board's Policy No. 5131 provides in Article 8:

"A. School personnel have the authority to use reasonable force to maintain order in the schools. Corporal punishment, when administered, shall be administered fairly and impartially and in the following manner:

(1) In the principal's office by the principal or teacher with an adult witness present.

(2) Pupils may not be struck or slapped about the face or head.

(3) The parents of the child shall be notified by a school official by telephone, if possible, or in writing."

The Board's administrative regulation No. 51-44.1 further provides that:

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"In addition to the specific provisions of that policy, corporal punishment shall be administered in the following manner:

1. Corporal punishment should be used only when other methods of discipline have failed.
2. Students should be advised beforehand that specific acts of misconduct could result in corporal punishment.
3. School officials should not administer corporal punishment when angry or upset.
4. Only a paddle will be used in administering corporal punishment."

The petitioner-appellant contends that in order for the Board's action to be upheld we would have to adopt what she calls a *per se* rule, that is, that every touching about the face violates the Board's policy. She contends this is so because when the evidence in this case is measured by the rule of *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), the only finding that can be supported is that she struck the students not as corporal punishment, but to get their attention to keep them from harming others or themselves. Petitioner-appellant contends that by penalizing her for this action the interpretation of the Board's policy puts it in conflict with G.S. 115-146 which confers on teachers the power to use reasonable force to maintain order in the classroom and prohibits school boards from adopting policies which interfere with this right and duty.

We recognize there may be some instances when striking a child is not punishment, but is done to remedy some immediate problem by getting the child to take some action for his own or someone else's safety. However, we do not pass on the question in this case. We hold that under *Thompson v. Wake County Board of Education*, *supra*, the Board could find that petitioner-appellant administered corporal punishment to the students named in the Board's findings and this corporal punishment violated the Board's policy. We also hold the policy is not proscribed by G.S. 115-146. Under *Thompson*, our courts are required to use the "whole record" test. Looking at the whole record, there is une-

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quivocal evidence that Mrs. Kurtz struck the students about the head or grasped them so firmly about the arm as to leave a bruise. There is also unequivocal evidence that this was done not to get their attention or to make them take some action, but to punish them for previous wrongdoing. The petitioner-appellant's own testimony contradicted this evidence, but in considering all the evidence we cannot substitute our judgment for that of the Board. In *Thompson*, the evidence that the teacher had encouraged his students to fight among themselves was inconclusive. The teacher offered evidence which showed the words of the teacher which the Board relied on in that case were actually used to stop students from fighting. In the case sub judice, the evidence of corporal punishment is conclusive. There is some contradictory evidence, but taking all evidence into account we would have to substitute our judgment for that of the Board to reverse.

[2] The defendant's last assignment of error deals with the Board's not having a public hearing at the meeting at which petitioner-appellant was discharged. G.S. 115-142 says in part:

(j) Hearing Procedure.—The following provisions shall be applicable to any hearing conducted pursuant to G.S. 115-142(k) or (l).

(1) The hearing shall be private.

The Board's policy provided for a public hearing, but in light of this provision of the statute, the Board repealed this provision of the policy immediately prior to the meeting and went into a private session. Petitioner-appellant contends G.S. 115-142(j)(1) is an anomaly when contrasted with the Open Meetings Law, G.S. 143-318.1 et seq. See *Student Bar Association v. Byrd*, 32 N.C. App. 530, 232 S.E. 2d 855 (1977). It may be an anomaly, but it is the law as adopted by the General Assembly. The Board was bound by it. The petitioner-appellant also contends she was deprived of her constitutional rights by the holding of a private hearing. She relies on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d 711 (1977). In that case, the United States Supreme Court held that the Eighth Amendment to the United States Constitution does not bar corporal punishment in schools as a cruel and unusual punishment. The opinion in that case relied upon "the openness of the public school and its supervision by the community afford significant safeguards against the kinds

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of abuses from which the Eighth Amendment protects the prisoner." *Ingraham, supra*, at 670. We do not believe *Ingraham* is authority for the proposition that it is unconstitutional not to have an open meeting to discuss the discharge of a public school teacher. Petitioner-appellant also contends it was unconstitutional for the Board not to follow its own stated procedure so far as open meetings are concerned. The Board changed its procedure to comply with the state law. Petitioner-appellant had a full hearing with all procedural safeguards. She has not shown how she was damaged by the change of the Board's policy to comply with the law and we hold it was not unconstitutional for the Board to make this change.

From a reading of the entire record, it appears that Mrs. Kurtz was a new teacher operating under difficult circumstances for her. Nevertheless, we cannot substitute our judgment for that of the Board.

Affirmed.

Judges MORRIS (now Chief Judge) and HEDRICK concur.

RELIANCE INSURANCE COMPANY v. NORTH CAROLINA NATIONAL BANK

No. 7826SC180

(Filed 16 January 1979)

1. Banks and Banking § 3— plaintiff as depositor—bank's duty to abide by agreement

Where plaintiff opened an account in defendant bank, provided its initial funding of \$12,000, met with representatives of defendant and entered into a detailed agreement specifically delineating the conditions under which defendant could pay funds out of the account, plaintiff was a depositor of the defendant and could not be deprived of that status by the fact that defendant agreed to use the name of a contractor on the account or that defendant sent monthly banking statements and cancelled checks to the address of the contractor; therefore, defendant was required to comply strictly with its agreement with plaintiff in making payments from the account.

2. Banks and Banking § 3— unauthorized payment of levy against account—bank's notice of ownership of funds

The trial court properly concluded that funds in a checking account were not the property of a contractor but of plaintiff surety and that the funds were

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not subject to a levy by the IRS against the property of the contractor, and defendant's contention that the "Trust Agreement" it entered into with plaintiff did not create a valid trust under the laws of N.C. was irrelevant, since the funds deposited in the account could only be disbursed by plaintiff; the "Trust Agreement" provided that defendant would pay over to plaintiff any monies in the account upon request by plaintiff; and defendant knew that plaintiff provided the initial funding of the account, that subsequent funding was from the contractor's assignment of future proceeds from bonded contracts and from plaintiff, and that the funds in the account were held for the sole purpose of discharging plaintiff's obligation under its bond.

3. Banks and Banking § 11— unauthorized payment of check—no obligation of depositor to mitigate damages

Where defendant bank made an unauthorized payment from plaintiff's account to the IRS, plaintiff had no duty to mitigate its damages by filing a claim for a refund with the IRS, since a depositor's funds are unaffected by any unauthorized payment and the depositor may sue either the person to whom the deposit has been paid without authority or the bank, and since the bank may not fail to take action to recover the wrongful payment and then plead as a defense the failure of the depositor to take action against the wrongful payee when both parties have a similar opportunity to remedy the wrong.

APPEAL by defendant from *Martin, Judge (Harry C.)*. Judgment entered 1 November 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 5 December 1978.

This is a civil action wherein Reliance Insurance Company ("Reliance") seeks to recover \$7,164.21 plus interest from North Carolina National Bank ("Bank") for refusing to honor a check drawn on a special account at the Bank. The defendant answered denying liability and alleging as an affirmative defense that it should not be liable because plaintiff failed to take any action to mitigate its damages. After a trial without a jury, Judge Martin made findings of fact, which, except where quoted, are summarized below:

On 31 August 1973, representatives of Rustin Construction Company, Inc., ("Rustin"), Reliance, and the Bank met to discuss the opening of an account for Rustin. It was explained to representatives of the Bank that Rustin wished to open an account entitled "Rustin Construction Company, Inc.—Special Account" and that Rustin and Reliance wanted the Bank to enter into an agreement entitled "Trust Agreement." The pertinent portions of the "Trust Agreement" are as follows:

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Whereas Surety [Reliance] has, at the request of Contractor [Rustin], issued a certain bond, . . . which bond has been furnished in connection with a certain construction contract of Contractor, hereinafter referred to as "Colonial Villa Apartments," and

Whereas Surety has certain rights at law and under the covenants contained in the Indemnity Agreement executed by Contractor as part of inducement to Surety furnishing suretyship to the Contractor, among which are rights of Surety to have all payments earned or to be earned by Contractor under Bonded Contracts applied to the payments of labor and material and charges of Contractor incurred in connection with the performance of Bonded Contracts;

Now, therefore, in consideration of the Surety refraining from action at the present time to enforce said rights but reserving the right to enforce them at any other time, the parties to this Agreement hereby agree as follows:

(1) The Contractor hereby authorizes the Bank to establish a trust account in said Bank. The name of the trust account shall be "Rustin Construction Company, Inc. Special Account."

(2) The Contractor agrees to deposit or cause to be deposited in the Bank all monies now due or to become due under the Bonded Contract listed in Schedule A.

(3) Bank agrees to deposit the proceeds of all monies received from said Bonded Contract from Contractor or from Surety, in said trust account.

(4) Withdrawals on said trust account shall be made by check bearing the signature of a representative designated by the Contractor and the countersignature of a representative or representatives designated by the Surety.

(5) The Contractor will issue and submit to the Surety for counter signature checks on said trust account solely for the purpose of paying labor and material charges and subcontractor's charges incurred in the performance of the Bonded Contract.

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(6) The Bank, upon written request from the Surety, will pay over to the Surety any funds on deposit in said trust account and the proceeds of any monies received under said assignments after said request from the Surety. The Surety will use any such funds so received to indemnify itself for loss under said bond or to pay claims presented under such bond or to hold for collateral in connection with said bond, and the Surety will account to the Contractor for any such funds so received.

(7) The Bank, upon written notice to such effect from the Surety that bond has been discharged, shall pay over to the Contractor any balance remaining in said trust account at the time of receipt of such notice from the Surety and any proceeds subsequently received under said assignments on said Bonded Contract.

(8) There shall be no obligation or liability on the part of the Bank other than as set forth in this Agreement to deposit proceeds of monies received under the assignments to the trust account and to pay out funds in said trust account as provided herein. The Bank and the Surety shall have no obligation to assure that checks issued on said trust account are actually for payment of bona fide charges on said bonded job, said obligation being solely that of the Contractor.

A certified copy of corporate resolutions authorizing the opening and maintaining of a checking account was furnished to the Bank by Rustin. A signature card was prepared by the Bank that authorized Jason M. Rustin, President of Rustin Construction Company, Daniel H. Wilson, Attorney for Reliance, and Michael J. Buhr, local agent for Reliance, to execute checks on the special account and contained the further "instruction that checks must be signed by any combination of the two authorized signatures, one of which must be Mr. Rustin's."

The account was opened as a "commercial account" and was initially "funded by plaintiff's [Reliance's] draft No. 5222, dated August 30, 1973, in the amount of \$12,000.00." Numerous checks were drawn on the account and all statements, cancelled checks, and deposit slips in connection with the special account were sent by the Bank to Rustin at its address shown on the signature card.

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To the Bank, the term "special account" added to the designation of a bank account has no significance other than to distinguish that account from other accounts of the same depositor" and "is a customary banking practice at NCNB and in other banks in North Carolina."

On 26 August 1974, the Bank was served at its Bank Administration Department with a Notice of Levy by the Internal Revenue Service of the United States "on all monies and bank deposits of Rustin Construction held by NCNB." This Notice of Levy specifically referred to the special account. After being served with the Notice of Levy, the Bank, following its usual and customary practice, checked the account name, address, number and special instruction on the signature card against the Notice of Levy. By letter dated 26 August 1974, the Bank "advised Rustin Construction of the Service of the Levy and the steps NCNB was taking in response thereto." The Bank never received any response to this letter from Rustin and did not send any notice of the Levy to Reliance. On 5 September 1974, the Bank "debited the balance in the Account, in the amount of \$7,164.21 to purchase an official check payable to the Internal Revenue Service in settlement of the tax levy." The check was mailed to the I.R.S. and a copy of the checking account debit was sent to Rustin in its monthly statement for September, 1974.

Mr. Daniel Wilson, attorney for Reliance, contacted the Bank and informed Mr. J. W. Kiser, Corporate Counsel and Senior Vice President of the Bank, that it should not have paid out the money to the I.R.S. in response to the tax levy because the funds belonged to Reliance and not to Rustin. Subsequently, the Bank checked with the I.R.S. for details of its procedures for handling a possible claim for a refund.

On 23 January 1975, Reliance presented to the Bank check number 0251 drawn on the account and made payable to Reliance in the amount of \$7,164.21. The check was returned by the Bank unpaid and marked "NSF."

Thereafter, the Bank was informed by the I.R.S. that it "did not have sufficient information to make a determination with respect to the correctness of its levy" and in order to make a refund "it would require someone at NCNB or Reliance to state under penalties of perjury that (1) the funds in the Account ac-

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tually belonged to Reliance, and (2) that the Account was a bona fide trust account in all respects under North Carolina law."

Mr. Kiser believed that the Bank did not have sufficient facts and information to meet the first requirement and "was not of the opinion that the Account was a bona fide trust account under North Carolina law." Mr. Kiser told Mr. Daniel Wilson of Reliance that the Bank, "as an accommodation to Reliance . . . would file a claim if the required information and opinions were furnished to NCNB by Reliance." Neither Reliance nor the Bank has filed any claim with the I.R.S. for wrongful levy.

Based on the foregoing findings of fact, the trial court made the following conclusions of law:

2. Under the terms of the Trust Agreement, a copy of which was retained by NCNB, Reliance was entitled to a notice of the levy made by Internal Revenue Service and NCNB failed to give Reliance such notice.

3. The Trust Agreement constituted a valid trust under the laws of North Carolina; therefore, the funds in the account did not belong to Rustin Construction.

4. The defendant, NCNB, had the same opportunity as did the plaintiff, Reliance, to file a claim with Internal Revenue Service for a refund of the funds wrongfully levied upon; therefore, Reliance was under no duty to mitigate its loss by making a claim against Internal Revenue Service for the wrongful levy.

From a judgment that plaintiff "have and recover of the defendant the sum of \$7,164.21, plus interest as provided by law from January 23, 1975," defendant appealed.

Miller, Johnston, Taylor & Allison, by H. Morrison Johnston, for plaintiff appellee.

Helms, Mulliss & Johnston, by Nancy Black Norelle and Robert B. Cordle, for defendant appellant.

HEDRICK, Judge.

At the outset, we note that defendant, although properly grouping its exceptions and assignments of error in the record,

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has failed to bring them forward in his brief as required by Rule 28(e) of the Rules of Appellate Procedure. We nevertheless proceed to treat the assignments of error in the record as though they had been properly brought forward.

The facts of this case are not in controversy. Defendant's assignments of error all relate to the trial court's conclusions of law. Defendant first contends that it was not required as a matter of law to give notice of the levy to Reliance because Reliance was not a depositor of the Bank and Reliance did not have an account with the bank. Nowhere in defendant's brief is there cited any legal authority for its contentions. Defendant argues only that the corporate resolution authorizing the opening and maintaining of the account was executed by Rustin, and that Reliance never requested the Bank to include its name on the account signature card as a depositor or to send monthly statements or cancelled checks to it. Defendant next contends that the terms of the agreement do not require it to give notice of the tax levy to Reliance. In support of this contention, defendant argues that nowhere in the agreement is there any language specifically requiring the Bank to give notice of a tax levy to Reliance or stating that the funds coming into the special account were the property of Reliance.

[1] We believe defendant's contentions are wide of the mark. Reliance was a depositor of the Bank. By opening an account and delivering to a bank money, funds, or credits constituting the deposit, one becomes a depositor and a contractual relationship between the bank and the depositor is created. *In re Michael*, 273 N.C. 504, 160 S.E. 2d 495 (1968); 10 Am. Jur. 2d *Banks* § 338 (1963). While it is certainly possible to open an account using the funds of a third party and not create a depositor relationship between the bank and the third party, that is not the situation in the present case. Here, not only did Reliance open the account and provide its initial funding of \$12,000, but it also met with representatives of the Bank and entered into a detailed agreement specifically delineating the conditions under which the Bank could pay funds out of the account. The fact that the Bank agreed to use the title "Rustin Construction Company, Inc. Special Account" or that it sent monthly banking statements and cancelled checks to the Charlotte address of Rustin does not deprive Reliance of its status as a depositor. The fact that Rustin was a

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depositor obviously does not preclude Reliance from also being a depositor of the same account. Finally, we note that the agreement itself provided that "Bank agrees to deposit the proceeds of all monies received from said Bonded Contract from Contractor [Rustin] *or from Surety* [Reliance], in said trust account." (Emphasis added.)

The general rule concerning a bank's duties to its depositors is as follows:

Since a deposit is a matter of contract between a depositor and the bank, the depositor may stipulate at the time of deposit as to how or by whom the money may be drawn out . . . A high standard of contractual responsibility has been imposed on banks in paying money chargeable against their depositors' accounts. The bank must, in paying out a deposit, comply with its agreement with the depositor. In the absence either of prior or subsequent negligence or misleading conduct on the part of the depositor, it cannot charge him with any payments except as are made in conformity with his genuine orders; payments otherwise made cannot be charged against the depositor *regardless of the care exercised and the precautions taken by the bank.* (Emphasis added.)

10 Am. Jur. 2d *Banks* § 494, at 462-63 (1963).

While the Bank may not have had a duty as a matter of law to give notice to Reliance of the tax levy, had it given notice then that would constitute one element in determining any "prior or subsequent negligence" on the part of the depositor; however, it would not have absolved the Bank of liability for making a payment not in conformity with the terms of the "Trust Agreement." In addition, the language contained in paragraph (8) of the agreement does not relieve the Bank of liability for wrongful payment; it only provides that the Bank has "no obligation to assure that checks issued on said trust account are actually for payment of bona fide charges" pursuant to the bonded contract.

[2] Defendant next contends that the "Trust Agreement" it entered into did not create a valid trust under the laws of North Carolina. Assuming *arguendo* the correctness of this contention, we think it irrelevant. Once funds were deposited in the special account they could only be disbursed as approved by Reliance,

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and they no longer were the property of Rustin, if indeed they ever were. The language of the agreement plainly stated that Reliance had the right "to have all payments earned or to be earned by Contractor [Rustin] under Bonded Contracts applied to the payments of labor and material and charges of Contractor [Rustin] incurred in connection with the performance of Bonded Contracts." Furthermore, although Rustin would not by itself withdraw any funds from the special account, the agreement provided that the Bank "upon written request from the Surety [Reliance], will pay over to the Surety [Reliance] any funds on deposit in said trust account and the proceeds of any monies received under said assignments after said request from the Surety [Reliance]."

Additionally, there is plenary evidence in the record tending to show that the Bank knew that Reliance provided the initial funding of the account, that subsequent funding was from Rustin's assignment of future proceeds from bonded contracts and from Reliance, and that the funds in the account were held for the sole purpose of discharging Reliance's obligation under its bond. A cursory examination of the "Trust Agreement" reveals that its purposes were to ensure that all of the funds in the special account would be used for Reliance's benefit and to protect Reliance from having funds improperly disbursed. The trial court correctly concluded that the funds in the account were not the property of Rustin, and therefore were not subject to the levy by the I.R.S. against the property of Rustin. This assignment of error has no merit.

[3] Finally, defendant contends that the court erred in concluding that Reliance had no duty to mitigate its damages by filing a claim for a refund with the I.R.S. or assisting the Bank in doing so because Reliance could have done either with little or no expense while the Bank did not have the necessary information to file the claim.

The funds in the special account were not the property of Rustin and the Bank had no authority to pay the funds to the I.R.S. in settlement of the tax levy against Rustin. The general rule is that a depositor's funds are unaffected by any unauthorized payment and the depositor may sue either the person to whom the deposit has been paid without authority or the Bank.

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10 Am. Jur. 2d *Banks* § 508 (1963). We do not believe that the depositor should be put to an election in this situation and thus be forced to run the risk of being precluded from maintaining an action against the Bank. Nor do we believe that the Bank should be permitted to take no action to recover the wrongful payment and then plead as a defense the failure of the depositor to take action against the wrongful payee when both parties have a similar opportunity to remedy the wrong. See *Shaw v. Greensboro*, 178 N.C. 426, 101 S.E. 27 (1919). Furthermore, on the facts of this case we are unable to say that Reliance would have been able to minimize the loss "with reasonable exertion or trifling expense." *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 121, 123 S.E. 2d 590, 598 (1962); *Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945).

For the reasons stated above the judgment appealed from is affirmed.

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. EDDIE BOYDEN FRANCUM

No. 7825SC773

(Filed 16 January 1979)

1. Searches and Seizures § 34— inspection of contents of paper bag in wrecked car—plain view doctrine inapplicable

A highway patrolman's inspection of items contained in a paper bag which either fell from or was taken by the officer from defendant's wrecked car constituted a search, and the plain view doctrine was inapplicable to the seizure of the items.

2. Searches and Seizures § 11— inspection of contents of paper bag in wrecked car—no unreasonable search and seizure

A highway patrolman's inspection of the contents of a paper bag in a wrecked car for the purpose of securing the owner's property prior to having the wrecked car towed away did not constitute an unreasonable search and seizure, and narcotics found in the bag were properly admitted in evidence.

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3. Criminal Law § 99.4— correction of defense counsel—instruction to counsel not to object—no expression of opinion

The trial court did not express an opinion on the evidence when defense counsel confused two of the State's exhibits during cross-examination of a witness and the court corrected counsel in the presence of the jury, or when defense counsel repeatedly objected to a question put to a witness by the State and the court instructed counsel not to object to the question again.

4. Narcotics § 4— possession of LSD with intent to sell—evidence of quantity

There was sufficient evidence of quantity to justify submission to the jury of a charge of possession of LSD with intent to sell where there was testimony that the LSD powder was in "four smaller plastic bags" found within other plastic bags.

5. Narcotics § 4.5— instructions—intent to sell LSD

The trial court's instructions were not susceptible to the construction that the jury could find defendant guilty of possession of LSD with intent to sell if it found him guilty of mere possession or that the jury could infer intent to sell in the LSD charge if it found that defendant had an intent to sell secobarbital.

ON writ of certiorari to review proceedings before *Kirby, Judge*. Judgment entered 2 February 1977 in Superior court, CALDWELL County. Heard in the Court of Appeals on 5 December 1978.

Defendant was charged in proper bills of indictment with felonious possession of more than 100 dosage units of Secobarbital, felonious possession with intent to sell hashish, and felonious possession with intent to sell Lysergic Acid Diethylamine (LSD). Upon his plea of not guilty, the State introduced evidence tending to show the following:

On 20 October 1975, defendant wrecked a red 1965 Volkswagen automobile on the Abingdon Road near Lenoir, North Carolina. At approximately 3:00 p.m., William Brown from the Caldwell County Ambulance Service arrived on the scene, examined the defendant, and then transported him to the hospital in an ambulance. State Trooper L. O. Church arrived at the scene of the accident as the ambulance carrying the defendant was leaving. Trooper Church did not see the defendant at that time. He observed the wrecked Volkswagen automobile lying upside down in a ditch beside the road and noticed a brown paper bag lying on

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the roof inside the upturned automobile. Trooper Church initially testified that he reached inside the car and seized the bag, but later said that the bag had fallen out of the car as it was being uprighted and he picked it up off the ground. Trooper Church opened the bag and examined its contents, finding in separate plastic containers a green vegetable block substance, a white and pinkish powder, and a number of capsules. An analysis of these items by the State Bureau of Investigation showed them to be 55 grams of hashish, capsules containing secobarbital, and an undetermined quantity of LSD.

The defendant offered no evidence.

The jury found defendant guilty as charged. A judgment was entered on the verdict sentencing defendant to ten years on the charge of felonious possession with intent to sell LSD, and three to fifteen years on the charges of felonious possession of hashish and secobarbital, to run at the expiration of the ten year sentence on the LSD charge. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

William W. Respass, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant first contends that the items contained inside the paper bag were the products of an unconstitutional search and seizure under the Fourth Amendment, and they should have been excluded from evidence. Defendant argues that Trooper Church did not have probable cause to justify a search of defendant's automobile and that the warrantless search resulting in seizure of the contents of the paper bag cannot be justified under any of the exceptions for automobile searches.

A "search" proscribed by the Fourth Amendment contemplates an unreasonable governmental intrusion into an area in which a person has a justifiable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). See also, *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), cert. denied, 404 U.S. 840, 92 S.Ct. 133, 30 L.Ed. 2d 74 (1971). The fundamental inquiry in considering Fourth Amendment issues is

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whether a search or seizure is reasonable under all the circumstances. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967); *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969).

[1] The State, while frankly conceding that Trooper Church lacked probable cause to believe that defendant had committed a crime, argues that there was no "search" at all, and that the officer merely seized what was in his "plain view."

Courts have noted the diminished expectation of privacy that surrounds the automobile in several cases. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed. 2d 325, 335 (1974). Additionally, the manner in which motor vehicles may be operated on public highways and streets and their condition are subjects of extensive state regulation.

In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977), the Supreme Court dealt with a warrantless search of a footlocker in the trunk of an automobile conducted subsequent to defendant's arrest. The Supreme Court noted that "[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." 433 U.S. at 11, 97 S.Ct. at 2483, 53 L.Ed. 2d at 548. The Court also distinguished the search of defendant's footlocker from a search of an automobile:

The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

433 U.S. at 13, 97 S.Ct. at 2484, 53 L.Ed. 2d at 549.

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Although the defendant in the present case, by placing the items in a paper bag, clearly had a lesser expectation of privacy than one who places them in a locked footlocker, we think the trooper's actions were a search and the protections of the Fourth Amendment are applicable. While the paper bag itself may well have been within the trooper's plain view, clearly its contents were not. Trooper Church's inspection of the items contained in the paper bag was clearly a search, and the plain view exception is not applicable.

[2] The State further argues that under G.S. §§ 20-49(7), 20-166.1 (e) Trooper Church had a duty to investigate traffic accidents and file a written report detailing the results of his investigation. Thus, it argues, Trooper Church was properly at the scene of the accident and merely carrying out his duties when he discovered the contraband; his seizure of the bag's contents is therefore not unreasonable under the circumstances and does not violate the Fourth Amendment.

In *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed. 2d 706, 714-15 (1973), the Court noted:

Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Similarly, in *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 96 S.Ct. 3092, 3097, 49 L.Ed. 2d 1000, 1005 (1976), the Court noted that vehicle accidents were one example of such a "caretaking function" where a disabled vehicle is taken into police custody: "To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities."

South Dakota v. Opperman, *supra*, dealt with a warrantless inventory search of a vehicle taken into police custody. Although Trooper Church's inspection of the bag's contents in the present case does not fall within the inventory search exception, we think

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the same considerations justifying an inventorying of a person's property in an automobile that has properly been taken into police custody are applicable. The primary justification for such a limited intrusion by the police is that of safeguarding the individual's property from loss or theft. *South Dakota v. Opperman*, 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed. 2d at 1005. In many instances the automobile taken into police custody may be temporarily stored at a location several miles from the station house. *Cady v. Dombrowski*, 413 U.S. at 443, 93 S.Ct. at 2529, 37 L.Ed. 2d at 716. Such a limited search in the inventory context has been held a reasonable response to the possibility of theft or vandalism. *South Dakota v. Opperman*, 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed. 2d 1005. Additional justifications have been found in protecting the police against claims or disputes over lost or stolen property, and protection of the police from potential danger. *Id.*

In the present case, we are unable to say that Trooper Church's conduct in looking inside the paper bag was unreasonable under the circumstances. Indeed, there has been no contention that the procedure was a pretext for concealing an investigatory police motive or that the search was unreasonable in scope. Trooper Church, having arrived on the scene, was in charge of seeing that the wrecked automobile was safely transported from the scene and stored. It was reasonable for the officer to see that the personal effects in the automobile were not lost and were secured prior to the towing of the automobile. Under the circumstances, it is reasonable for such an officer to look inside a paper bag to determine whether there is anything valuable belonging to the owner that the officer should hold for safekeeping. We note that the fact that items were contained in a paper bag manifests a lesser interest in keeping them hidden from public view than where items are placed in one's personal luggage, as occurred in *United States v. Chadwick, supra*. Unlike a suitcase or briefcase, which are designed to hold one's personal effects, a paper bag may hold any number of items, many of which would not necessarily be personal in nature. Similarly, an officer securing an owner's property in preparation to having a wrecked automobile towed away would not be justified in examining the contents of a briefcase or suitcase, as such containers are themselves valuable. We hold that Trooper Church's conduct was

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not an unreasonable search or seizure in violation of defendant's Fourth Amendment rights. This assignment of error has no merit.

[3] Defendant next assigns as error certain comments made by the trial judge to defense counsel in the presence of the jury as being in violation of G.S. § 1-180 (now G.S. §§ 15A-1222, 1232, effective 1 July 1978). Defendant relies on the well-established rule that every person charged with a crime has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977). Numerous cases have held that G.S. § 1-180, while referring explicitly only to the charge, forbids the trial judge from expressing or implying in the presence of the jury, any opinion as to guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of a witness at any time during the course of the trial. *E.g.*, *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977); *State v. Lewis*, 32 N.C. App. 471, 232 S.E. 2d 472 (1977).

The first alleged expression of opinion by the trial judge occurred during defense counsel's cross-examination of a witness for the State as to his prior testimony with regard to one of the State's exhibits. The trial judge permitted the questioning until it became apparent that defense counsel had confused two of the State's exhibits. He then corrected defendant's counsel in the presence of the jury. Defendant argues that the manner of the judge was unduly harsh and resulted in emasculating the effectiveness of defense counsel. The second purported expression of opinion occurred after counsel had repeatedly objected to a question put to a witness by the State. The judge instructed defense counsel not to object to the question again.

The trial judge has discretion to keep the cross-examination of a witness within reasonable bounds. *Stansbury's N.C. Evidence* § 38, at 113 (Brandis rev. 1973). We do not think that the judge's comments in correcting defense counsel's confusion and limiting the cross-examination were so inordinately critical as to be prejudicial to the defendant. The judge's comment to defense counsel to not object to the questioning was clearly precipitated by the actions of defense counsel himself. We are unable to say that the judge's actions in the present case constituted prejudicial error.

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[4] Defendant next contends that the jury should not have been allowed to consider the charge of possession with intent to sell LSD because there was no evidence as to the amount of the controlled substance possessed by the defendant nor any evidence that it was packaged and suitable for distribution. In the present case, the chemist from the State Bureau of Investigation who analyzed the controlled substances did not weigh or otherwise determine the exact amount of the substance he found to be LSD.

Under *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978), the quantity of the drug seized is a relevant factor in determining whether there was an intent to sell, and where the quantity seized is extremely small, the court should not instruct the jury on the intent to sell portion of the charge. Nevertheless, we believe that there was sufficient evidence of quantity in the present case to justify submission of possession with intent to sell LSD. There was testimony that there were "several plastic bags with smaller plastic bags contained inside with a pink powder substance." The LSD that was seized was described later as "the four smaller plastic bags containing a pink powder substance and also contained in the small corner of a plastic bag was three capsules with pink powder in them also." We believe the foregoing was sufficient evidence to allow submission to the jury the charge of possession with intent to sell LSD. This assignment of error has no merit.

[5] Finally, defendant contends that the trial court failed to properly instruct the jury regarding possession with intent to sell and deliver LSD. Defendant first argues that the instructions explaining what constitutes possession were confusing and that the charge could be construed to allow the jury to find the defendant guilty of possession with intent to sell if they found him guilty of mere possession. The defendant next argues that the court failed to adequately distinguish between the charges of possession with intent to sell LSD and possession with intent to sell secobarbital, and that the jury was thereby misled into believing that it could infer intent to sell in the LSD charge if it found that defendant had an intent to sell secobarbital.

We have examined the instructions to the jury in light of defendant's contention and we are unable to find any merit in this assignment of error. The trial judge properly instructed as to the

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separate elements of each charge that the State was required to prove. *State v. Baker*, 285 N.C. 735, 208 S.E. 2d 696 (1974). The charge, when considered as a whole, is fair, complete, accurate, and free from prejudicial error.

The defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ERWIN concur.

TAZZIE F. BLACKWELL v. GRANVILLE COUNTY DEPARTMENT OF
SOCIAL SERVICES

No. 789SC201

(Filed 16 January 1979)

1. Social Security and Public Welfare § 1— department's denial of old age assistance—de novo hearing by court proper

Pursuant to the provisions of G.S. Chapter 108, the trial court could conduct a de novo hearing on plaintiff's appeal from defendant's denial of her petition for special assistance for an aged adult.

2. Social Security and Public Welfare § 1— special assistance for aged adult—assets previously distributed—sufficiency of evidence

In an action to obtain special assistance for an aged adult, evidence was sufficient to support the trial court's finding that all but \$3000 of plaintiff's assets had been distributed to her children in cash, and the court properly remanded the case to defendant Department of Social Services for further verification as to whether that \$3000 should be included in plaintiff's reserve level and whether plaintiff "otherwise meets all the criteria of eligibility for Special Assistance to Aged Adults."

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 6 October 1977, Superior Court, GRANVILLE County. Heard in the Court of Appeals 6 December 1978.

In January 1977 an application was made to the Granville County Department of Social Services for Special Assistance for an aged adult on behalf of plaintiff herein. The application was made by Yvonne Weeks, a daughter of plaintiff. That application was denied because the Department of Social Services was not

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able to obtain an accounting satisfactory to it of \$5,500 belonging to Tazzie Blackwell. The denial was appealed, pursuant to G.S. 108-44, to the Director of the Division of Social Services, State Department of Human Resources. The denial of the application was affirmed by decision dated 29 June 1977.

Plaintiff, under the provisions of G.S. 108-44(e), filed a petition in the Superior Court for a hearing. The Superior Court, after hearing testimony evidence of both parties, entered an order finding facts and concluding that the \$5,500 had been distributed to plaintiff's children but that there had been no proper accounting for \$3,000 allegedly retained by a son of plaintiff from proceeds of the sale of land. The court remanded the case to Granville County Department of Social Services "for further verification as to whether the \$3,000.00 withheld by plaintiff's son, A. H. Blackwell, should be included in the plaintiff's reserve level and a determination as to whether the applicant otherwise meets all of the criteria of eligibility for Special Assistance to Aged Adults". Defendant appeals from the entry of this order.

Allsbrook, Benton, Knott, Cranford & Whitaker, by Dwight L. Cranford, for plaintiff appellee.

Watkins, Finch & Hopper, by William L. Hopper, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant contends that the court erred as a matter of law in subjecting the Social Services' decision to de novo review and ignoring competent, relevant and substantial evidence which supported its decision to deny relief. We disagree.

G.S. 108-44(e) provides:

"Any appellant or county board of social services who is dissatisfied with the decision of the Secretary may file a petition within 30 days after receipt of written notice of such decision for a hearing in the Superior Court of Wake County or of the county from which the case arose. Such court shall set the matter for a hearing within 30 days after receipt of such petition and after reasonable written notice to the Department of Human Resources, the county board of social services, the board of county commissioners, and the ap-

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pellant. The court may take testimony and examine into the facts of the case to determine whether the appellant is entitled to public assistance under federal and State law, and under the rules and regulations of the Social Services Commission. The court may affirm, reverse or modify the order of the Secretary."

The General Assembly has directed that when a petition is filed, the matter must be set for *hearing* within 30 days. Additionally the court "may take testimony and examine into the facts". Such review exceeds that under the "whole record" test advocated by defendant and available under the Administrative Procedure Act. G.S. 150A-51(5); *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The judicial review provisions of Article 4, Chapter 150A of the Administrative Procedure Act, clearly contemplate a limited scope of review upon the record of the proceedings below. Evidence is heard by the reviewing court only under unusual circumstances. G.S. 150A-50. Because the scope of review under G.S. 108-44(e) of the Social Services statute exceeds that under Article 4, Chapter 150A, the judicial review provisions of the Administrative Procedure Act are displaced by those under Chapter 108. See G.S. 150A-43, *Insurance Co. v. Ingram*, 34 N.C. App. 619, 240 S.E. 2d 460 (1977); see also *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E. 2d 879 (1963). The trial court acted within its authority to determine de novo whether the appellant is entitled to public assistance.

[2] Defendant next urges that the court erred in overturning the Department of Social Services' decision that plaintiff was ineligible to receive assistance. It is the position of defendant that no competent evidence was introduced that plaintiff had ever authorized anyone to dispose of some \$31,000.

In order for a person to be eligible for Special Assistance, it must be shown that the applicant's "reserve level", consisting of cash and other qualified assets, does not exceed \$1,000. The Director of Social Services for Granville County testified as follows: "In determining reserve levels we look at each case on a case by case basis but look for consistency. There is nothing in the manual of regulations that says we have got to do this or that, we have considerable leeway in arriving at a just and reasonable decision."

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Mrs. Yvonne Weeks, daughter of plaintiff, testified that on 28 January 1977 she made the original application on behalf of her mother, the plaintiff, but the application was denied because of a dispute as to \$5,500. She testified that the \$5,500 which "is being disputed in this action" was given to the six children of her mother during August 1976 and the distribution was made by her husband Paul Weeks. She further testified that her mother had no assets or funds in January 1977 except what was in her bank account the amount of which was not known to the witness. She received \$916 in cash and used it a "little at a time".

Mrs. Jane Blackwell Critcher's testimony was substantially the same as her sister's. Additionally, she testified that all the children were present when the money was distributed. Her \$916 was used to pay notes at the bank and to help with living expenses, including the expenses of a son in college.

Another daughter, Mrs. Betty Vaughn, also testified that the \$5500 was divided equally among the six children; that Paul Weeks gave out the money and did not ask for a receipt; that she gave her share to her three children.

Mrs. Gwendolyn Winston, another daughter, testified similarly. She said she did not deposit the money in her bank account but used it for various household expenses. She further testified that at that time her mother was in good health, was competent, and knew the extent of her property, her bank balance and where her funds were deposited. At the time of the hearing her mother was in a rest home in Henderson. She said, "We took her last money because she wanted us to have it and that's what we did, we took it." On cross-examination, Mrs. Winston testified that her one brother bought plaintiff's farm, the homeplace, consisting of about 30 acres for "somewhere around \$15,000.00"; that "he kept back" \$3,000 and turned the other \$12,000 over to Paul Weeks for distribution. The brother also received his share of the \$5500 in question.

Paul Weeks, Jr., testified that he was employed by Peoples Bank & Trust Company in Scotland Neck and had been for 21 years; that he is the son-in-law of the plaintiff; that he distributed the \$5,500 in cash to the six children each receiving \$916; that he notified the Department of Social Services that the money had been distributed. On cross-examination he testified that he had

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checks for the sale of the farm and other cash and that he distributed about \$26,000 by checks and the remainder in cash, mostly in hundred dollar bills; that he did not think it necessary in this case to take a receipt; that he realized that it was his mother-in-law's money and didn't really know the capacity in which he was acting on her behalf.

The Eligibility Specialist for the Granville County Department of Social Services testified that she took the application on 28 January 1977 from Mrs. Yvonne Weeks on behalf of plaintiff; that Mrs. Weeks told her that plaintiff's son had bought the farm for \$12,000; that plaintiff had withdrawn money from Granville Savings and Loan in the amount of \$8,000 and these funds were divided among the children; that she told Mrs. Weeks they would need verification and verbal verification would not be sufficient; that on 10 February 1978, she received verification from Planters National Bank that an additional \$8,000 had been withdrawn; that she wrote Mr. Weeks asking how the money was divided and for proof that it was no longer available to plaintiff; that Mr. Weeks mailed her cancelled cashier's checks showing that \$23,000 was divided among the children; that she discovered, after talking with the son that he paid \$15,000 for the land; that there was about \$8,500 that was not accounted for by cashier's checks; that she sent a statement to the son requesting information with respect to what he had paid and what he had kept but the statement was never returned; that she wrote Mr. Weeks setting out her figures and received a letter from him stating that the \$5,500 had been distributed in cash; that she advised him that unless better justification was received the application would be denied; that in January 1977 plaintiff's bank account did not contain sufficient funds to exceed the reserve level.

The Director of Social Services testified that he felt that a banker should be able to provide receipts and that a bank would not reasonably be handling cash in such a manner; that he felt they could have verified the \$3,000 but the \$5,500 was becoming exceedingly difficult; that "if in fact Mrs. Blackwell gave away the \$5500.00 in August of 1976, she would have been eligible in January 1977 for the assistance she applied for"; that he did not recall whether the issue of the \$3,000 was raised at the earlier hearing but the \$5,500 was adequate to back up the denial. He

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further testified that the application was for Special Assistance for the Aged which is available to persons living in a rest home.

The court made findings of fact, and those pertinent are as follows:

"4. That in ascertaining the plaintiff's reserve level, Martha Livingston, an Eligibility Specialist employed by Granville Social Services, determined that the plaintiff had an initial reserve level of \$31,864.36 and that \$23,364.36 had been distributed amongst the six children of the plaintiff by plaintiff's son-in-law, Paul Weeks, and that said sum was accounted for in the form of Cashier's Checks, leaving a balance of \$8,500.00 to be accounted for in the plaintiff's reserve level.

5. That the plaintiff received \$15,000.00 from her son, A. D. Blackwell, for the purchase of 35 acres of land. Further that A. D. Blackwell remitted to Paul D. Weeks \$12,000.00 of the purchase price, which was distributed amongst the plaintiff's other five children and apparently retained \$3,000.00 which is unaccounted for."

"10. That Granville Social Services used reasonable effort in attempting to verify the plaintiff's reserve level.

11. That the \$5,500.00 referred to in March 1, 1977 letter from Granville Social Services has been distributed amongst the six children of the plaintiff."

Based on his findings the court concluded that the \$5,500 had been distributed in cash to the six children but the \$3,000 allegedly retained by A. D. Blackwell had not been properly accounted for and remanded the case for further verification as to whether that \$3,000 should be included in plaintiff's reserve level and whether plaintiff "otherwise meets all of the criteria of eligibility for Special Assistance to Aged Adults".

There is sufficient evidence to support the court's findings of fact. Defendant does not contend otherwise. We are of the opinion that the findings support the court's conclusions. The court expressed its concern over the situation disclosed by this record. We cannot help but share his concern. It is completely obvious that plaintiff had some \$26,000 available for her care and support,

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and this sum would have maintained her comfortably in a rest home or nursing home for some time. We can certainly understand that anyone would look more kindly upon the application for assistance by plaintiff's children, had those children used the money they accepted for themselves for their mother's care before applying for taxpayer assistance. A person is entitled to assistance if they have no more than \$1,000 in assets in reserve. One who possesses great wealth can dispose of it to family and friends and become a ward of the county and State, cared for by funds furnished by the taxpayers. Nevertheless, regardless of the concern this case and others like it may generate, we did not make the rules nor can we change them. The result reached by the trial court must, therefore, be

Affirmed.

Judges ERWIN and MARTIN (Harry C.), concur.

FLEXLON FABRICS, INC. v. WICKER PICK-UP AND DELIVERY SERVICE, INC.

No. 7815SC159

(Filed 16 January 1979)

1. Bailment § 3.3— goods damaged during bailment—presumption of negligence

Upon a showing that a bailor delivered to a bailee undamaged goods which were returned in a damaged condition, the law presumes the bailee was negligent and, nothing else appearing, the bailor is entitled to go to the jury on the question of the bailee's negligence.

2. Bailment § 3.2— burden of proving bailment

The bailor has the burden of establishing the existence of a bailor-bailee relationship.

3. Bailment § 1— creation of bailment

A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee.

4. Bailment § 3.3— sufficient evidence of bailment—prima facie case of negligence

Plaintiff's evidence was sufficient to establish a bailment of its knitting machines where it tended to show that defendant was hired to tow loaded trailers containing plaintiff's machines from one of plaintiff's plants to its main facility; plaintiff's agent, as she had done four times previously, called defend-

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ant and requested that he send a tractor to tow a loaded trailer to plaintiff's main facility; and defendant proceeded to tow the trailer as requested. Furthermore, plaintiff made out a *prima facie* case of actionable negligence by defendant, requiring submission of that issue to the jury, where plaintiff presented additional evidence that the knitting machines were undamaged when delivered to defendant, that the trailer being towed by defendant's truck overturned, and that the machines were damaged beyond repair in the accident.

5. Bailment § 3.3; Negligence § 35.3— loading machinery on trailer—no contributory negligence as matter of law

In an action to recover for damages to knitting machines in a trailer being towed by defendant's truck, plaintiff's evidence did not disclose that it was contributorily negligent as a matter of law in the manner in which it loaded the machines into the trailer where it presented evidence tending to show that care was taken in loading the machines by chocking the base of each machine in order to prevent shifting and by packing articles around the machines for added stabilization, notwithstanding testimony by plaintiff's own expert would permit the jury to find that reasonable care required that the machines be packed in cases and bolted to the floor of the trailer or that they be placed on a pair of skids which are bolted to the bed of the trailer.

APPEAL by plaintiff from *Smith (David)*, Judge. Judgment entered 23 March 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 5 December 1978.

Plaintiff, Flexlon Fabrics, Inc., initiated this action to recover for losses suffered when a trailer under tow by a truck driven by defendant's employee overturned severely damaging its contents including five Kirkland knitting machines. Plaintiff alleges that defendant's agent was negligent in trying to negotiate a curve at an excessive rate of speed thus causing the loaded trailer to overturn. Defendant Wicker Pick-Up and Delivery Service, Inc., denied negligence and counterclaimed seeking recovery for damage to its truck and averring that plaintiff was negligent in failing to load the cargo in a reasonable manner to prevent the cargo from shifting and tipping over when the trailer rounded a curve.

Plaintiff's evidence tended to show that plaintiff was in the process of moving equipment from its Tucker Street plant to its main facility located in Belmont Village south of Burlington. Plaintiff rented several trailers from Mateer's Storage Trailer Rental, Inc. Battleground Wrecker Service brought the empty trailers to the loading dock at the Tucker Street plant and moved the loaded

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trailers a few hundred feet away from the dock. Defendant was hired to tow the loaded trailers from Tucker Street to Belmont Village, which it did four times without incident.

Plaintiff's personnel were responsible for all of the packing and loading of the trailers. Once the trailers were loaded, plaintiff's employees would lock them to prevent theft of their contents. Defendant did not have keys to the trailers. Plaintiff arranged for defendant to tow the trailers for ten dollars per hour. Defendant was informed that "the machines were heavy and that they were delicate, important to [plaintiff], and that it was [their] entire operation and they would have to be very careful." The machinery was loaded and the trailer locked before defendant's driver was summoned.

Plaintiff called an expert witness to testify with respect to the value and the proper loading of the knitting machines. Plaintiff's expert described the machines' weight distribution as "about a little lower than middle". The complaint averred that the machines were "top-heavy". They stood about seven feet tall and were six and one-half to seven feet by three and one-half to four feet at the base. Each machine weighed approximately 5,500 pounds. The four legs were connected in pairs to form two braces for the base of the machine. Plaintiff's expert testified that new knitting machines are packed in wooden cases and bolted to the case before being shipped. When not shipped in packing cases the machines are placed on a pair of skids and usually bolted to the bed of a trailer. When skids are not used it is customary to brace the machine at the top against the wall of the trailer with two-by-fours or rope.

Plaintiff's employees testified about packing the trailer which overturned. The machines were jacked-up onto rollers so they could be rolled to the trailer. After they were loaded, the rollers were removed and two-by-fours were nailed into the floor at a 45° angle to each leg to prevent the machine from shifting in transit. Boxes of yarn and plastic were packed around the machines to prevent movement and to utilize the available cargo space in the trailer.

The rented trailer overturned at the intersection of Rural Paved Roads 1157 and 1148. The intersection forms the shape of a "T". The roads intersect on level ground. The tractor and trailer

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were observed lying in the ditch on the left-hand side of the road. "The front end of it seemed to be further over toward the ditch than the back end." The trailer was found resting on its side "in a 8:30-2:30 position". The machinery and packing had all shifted to the top of the trailer although the two-by-four supports were still in place. The machines, the trailer, and the tractor were damaged.

Plaintiff's expert testified that the machines had a value before the accident of between \$10,000 and \$20,000 each. He concluded they had no value after the accident, because they were essentially damaged beyond repair. Plaintiff's president estimated the five machines were worth \$82,000 before the wreck and \$1,500 afterwards. The rented trailer suffered \$2,250 in damage.

Defendant moved for a directed verdict at the conclusion of plaintiff's evidence. The trial court directed entry of judgment for the defendant. Plaintiff appeals.

William L. Durham for plaintiff appellant.

Henson & Donahue, by Perry C. Henson and Perry C. Henson, Jr., for defendant appellee.

MORRIS, Chief Judge.

Plaintiff's sole assignment of error concerns the entry of judgment upon defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. The specific grounds of the motion were: (1) Plaintiff's failure to offer any evidence of negligence, (2) Contributory negligence as a matter of law, and (3) Failure to offer any evidence of damages.

In reviewing the propriety of the entry of the directed verdict, we will consider only those grounds argued by defendant to the trial court as the basis for its motion. *Worrell v. Hennis Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971); see generally 9 Wright and Miller, Federal Practice and Procedure: Civil § 2533 n. 83 and § 2536 n. 26.

[1] The ultimate question for resolution concerns whether plaintiff's evidence as it appears in the record before us was sufficient to withstand defendant's motion for a directed verdict. The threshold inquiry in this case, however, concerns whether a bailor-bailee relationship existed between plaintiff and defendant.

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If plaintiff's evidence sufficiently establishes such a relationship, then upon a showing that plaintiff delivered to the bailee undamaged goods which were returned in a damaged condition, the law presumes the bailee was negligent and, nothing else appearing, plaintiff is entitled to go to the jury on the question of defendant's negligence.¹ *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974).

[2, 3] The bailor has the burden of establishing the existence of a bailor-bailee relationship. *Troxler v. Beville*, 215 N.C. 640, 3 S.E. 2d 8 (1939); *Clott v. Greyhound Lines, Inc.*, 9 N.C. App. 604, 177 S.E. 2d 438 (1970), *rev'd on other grounds*, 278 N.C. 378, 180 S.E. 2d 102 (1971). A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee. *Freeman v. Service Co.*, 226 N.C. 736, 40 S.E. 2d 365 (1946). Delivery by the bailor relinquishing exclusive possession, custody, and control to the bailee is sufficient. *Wells v. West*, 212 N.C. 656, 194 S.E. 313 (1937); *see generally* Anno., 1 A.L.R. 394 (1919). An acceptance is established upon a showing directly or indirectly of a voluntary acceptance of the goods under an express or implied contract to take and redeliver them. Anno., 1 A.L.R. at 399-400.

[4] We find ample evidence of delivery and acceptance in this case to establish a bailment. *See Pennington v. Styron*, 270 N.C. 80, 153 S.E. 2d 776 (1967); *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416 (1954); *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560 (1935). Plaintiff's agent, as she had done four times previously, called defendant and requested that he send a tractor to tow the loaded trailer to Belmont Village. Marina Brooks, plaintiff's office manager and secretary-treasurer, testified, "I told him that the machines were heavy and that they were delicate, important to us, and that it was our entire operation and they would have to be very careful". Defendant, through its agents, subsequently responded and proceeded to tow the trailer as requested to Belmont Village. The defendant voluntarily and knowingly accepted exclusive control of the trailer and its contents from the time it left plaintiff's Tucker Street plant until the intended delivery at Belmont Village. The safety of the leased trailer and

1. A similar rule applies to common carriers. *See* G.S. 62-202 *et seq.* Because there is no evidence in the record to the contrary, we assume for purposes of this decision that defendant was not acting in a common carrier capacity. *See also Olan Mills v. Executive Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735 (1968).

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the machines lay exclusively with defendant while under tow by its agent.

"A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition." *Insurance Co. v. Cleaners*, 285 N.C. at 585, 206 S.E. 2d at 212; *quoting Insurance Co. v. Motors, Inc.*, 240 N.C. at 185, 81 S.E. 2d at 418.

Although the presumption of negligence does not entitle plaintiff to a directed verdict if defendant fails to produce evidence of his own due care, defendant risks an adverse jury verdict if it fails to introduce evidence of its own due care. *Insurance Co. v. Motors, Inc.*, *supra*. There is no doubt that on this record there may be many explanations for the overturning of the tractor and trailer. Admittedly, plaintiff may have improperly loaded the trailer. On the other hand, defendant's driver may have attempted to negotiate the turn too swiftly, the truck's brakes may have been inadequate, the intervening negligence of a third party may have caused the damage, or a combination of any number of other unexplained factors may have caused the trailer to overturn. The rule establishing a *prima facie* case exists precisely because of the likelihood of such unforeclosed possibilities. As our Supreme Court has explained:

"The fact that [plaintiff] could have no knowledge of such matters, while the defendant could and should have full knowledge of these matters, indicates the reason underlying the rule as to mode of proof in such bailments. The *prima facie* rule is invoked when the plaintiff's evidence discloses an unexplained failure to return the bailed property or an unexplained destruction of or damage to the bailed property while in the bailee's possession and control." *Insurance Co. v. Motors, Inc.*, 240 N.C. at 186, 81 S.E. 2d at 419.

As in *Insurance Co. v. Motors, Inc.*, *supra*, the record leaves the cause of the damage suffered by plaintiff (and defendant) unex-

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plained. Plaintiff, nothing else appearing, is entitled to have the case submitted to the jury for resolution.

[5] Defendant contends that plaintiff's own evidence establishes that plaintiff was contributorily negligent as a matter of law in that the knitting machines were improperly loaded causing the trailer and tractor to overturn. Taking the evidence in the light most favorable to the plaintiff, as we must upon review of a directed verdict for defendant, we disagree. The established rule is that a directed verdict for a defendant on the grounds of contributory negligence may only be granted when evidence taken in light most favorable to plaintiff establishes his negligence so clearly that no other reasonable inference may be drawn from that evidence. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). Plaintiff's evidence tends to show that care was taken by loading the machines by chocking the base of each machine in order to prevent shifting and by packing articles around the machines for added stabilization. However, the testimony of plaintiff's own expert would permit, but not compel, the jury to find that reasonable care required that the machines be packed in cases and bolted to the floor of the trailer, or that they be placed on a pair of skids which are bolted to the bed of the truck.

Based upon the evidence in this record we cannot say that the only reasonable inferences to be drawn from the evidence point to contributory negligence on the part of plaintiff. Plaintiff, upon this record, is not guilty of contributory negligence as a matter of law.

Defendant's final argument in support of his directed verdict, asserting that plaintiff presented no evidence of damages, is, upon the face of the record, clearly without merit.

Because we find that defendant was not entitled to a directed verdict upon any of the grounds asserted before the trial court, the judgment entering a directed verdict must be

Reversed.

Judges PARKER and MARTIN (Harry C.) concur.

Burkhimer v. Gealy

WALTON PETER BURKHIMER v. DON R. GEALY, INDIVIDUALLY, DON R. GEALY, EXECUTOR OF THE ESTATE OF MRS. DON R. GEALY, DAYCOA, INC., A CORPORATION, AND PREMIER PRODUCTS, INC., A CORPORATION

No. 7825SC198

(Filed 16 January 1979)

1. Limitation of Actions § 4.6— breach of employment contract—action barred

Plaintiff's claim of damages filed on 17 December 1974 for breach of the terms and conditions of his employment contract as to the amount of commissions, overrides, infringement of territory and fringe benefits which allegedly occurred prior to his dismissal on 17 December 1971 was barred by the statute of limitations.

2. Limitation of Actions § 4.6— termination of employment contract—action not barred

The statute of limitations as to plaintiff's claim for damages resulting from the termination of his employment contract on 17 December 1971 had not run when he commenced his action on 17 December 1974.

3. Master and Servant § 10— duration of employment contract—no contract for life

Plaintiff's contention that defendant's termination of his employment breached his contract of employment for life is without merit where the evidence tended to show that plaintiff wrote a letter to defendant stating that the employment agreement would continue for the rest of his life or until terminated by mutual agreement; defendant rejected those terms by writing to plaintiff that the terms of the employment agreement would continue in effect for one year and would continue unless changed by mutual agreement; and plaintiff accepted those terms by completing applications and submitting forms in accord with the terms of the letter and continuing to work even after receiving the letter and with knowledge of its terms.

4. Master and Servant § 10— contract terminable by mutual agreement—continuing contract—contract terminable at will of either party

Plaintiff's contention that, because his contract of employment with defendant was terminable by mutual agreement, it could endure for life is without merit since such contract was a continuing one, terminable at the will of either party.

APPEAL by plaintiff from *Kivett, Judge*. Judgment entered 4 October 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 6 December 1978.

This is a civil action for damages for breach of an employment contract. Plaintiff claimed damages for breach of the terms and conditions of the employment contract as well as future damages based on an alleged employment contract for life.

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Plaintiff was employed by defendant Daycoa, Inc. as a salesman in August 1963. Until that time, plaintiff had been selling similar products for another company in the same territory for a smaller commission than paid by defendant.

Defendant terminated plaintiff's employment 17 December 1971. Plaintiff filed this action 17 December 1974. Plaintiff claimed damages *prior* to 17 December 1971 for breach of the terms and conditions of his employment contract as to the amount of commissions, overrides, infringement of territory, and fringe benefits, as well as damages *after* 17 December 1971 based on the alleged employment contract for life. The terms and conditions of the alleged contract are the essence of the dispute in this case.

At the close of plaintiff's evidence, the trial judge granted defendants' motions for directed verdict as to all defendants except Daycoa, Inc., on the ground there was insufficient evidence to go to the jury. Defendant Daycoa, Inc. moved for directed verdict and it was granted for the following reasons: the claims for damages prior to 17 December 1971 were barred by the statute of limitations; the claim for future damages, based upon the employment contract for life, was too indefinite to enforce and was not supported by sufficient consideration. From this judgment, plaintiff appeals.

L. H. Wall, Beal and Beal, by Fate J. Beal, and Walton Peter Burkheimer for plaintiff appellant.

Townsend, Todd & Vanderbloemen, by Bruce W. Vanderbloemen, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff did not produce any evidence to prove a contract of employment with the defendants Don R. Gealy, Don R. Gealy, Executor of the Estate of Mrs. Don R. Gealy, or Premier Products, Inc. Plaintiff does not argue to the contrary in his brief. The trial judge properly dismissed plaintiff's claims against these defendants.

[1] The trial judge directed verdict for defendant Daycoa, Inc. on plaintiff's claims for damages. Plaintiff assigns this as error. Plaintiff's claims for damages are based upon the alleged breaches occurring *before* 17 December 1971 and for damages

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based upon the alleged breach of the life employment contract *after* 17 December 1971. The damages claimed *prior* to 17 December 1971 are based upon breach of the terms of the alleged contract throughout the employment period from 23 August 1963 until 17 December 1971 as to commissions, overrides, infringement of territory, and fringe benefits. The incidents giving rise to these alleged breaches occurred *prior* to the termination of plaintiff's employment on 17 December 1971. Defendant Daycoa, Inc. asserted the statute of limitations. An affirmative defense of the applicable statute of limitations places the burden of proof upon plaintiff to show his action was commenced within the statutory period. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961). Plaintiff commenced his action 17 December 1974. The statute of limitations for breach of contract is three years. N.C. Gen. Stat. 1-52. Plaintiff's claim for damages resulting from incidents occurring *before* 17 December 1971 is barred by the statute of limitations.

Plaintiff maintains that because the defendant was absent from the state, Section 21 of Chapter 1 of the General Statutes of North Carolina applies to prevent the running of the statute of limitations during the defendant's absence. The burden of proof is upon plaintiff to show that defendant comes within the purview of N.C.G.S. 1-21. From the evidence produced by plaintiff at trial, he did not meet this burden. Therefore, we do not reach the question of squaring N.C.G.S. 1-21 with the Long Arm Statute, N.C.G.S. 1-75.4, on this appeal. *See Duke University v. Chestnut*, 28 N.C. App. 568, 221 S.E. 2d 895 (1976); 12 Wake Forest L. Rev. 1041 (1976). Plaintiff's assignment of error as to the directed verdict on the claim for damages prior to 17 December 1971 is overruled.

[2] The statute of limitations as to plaintiff's claim for damages resulting from the termination of his employment contract *on* 17 December 1971 has not run because the action was commenced within three years from the date the alleged breach occurred. Plaintiff's claim for damages *on* and *after* 17 December 1971 is discussed below.

[3] The damages claimed *on* and *after* 17 December 1971 are based upon the breach of an alleged employment contract for life. Plaintiff first had to present evidence to establish the existence of

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the life contract. The trial judge properly directed a verdict on this claim because there was insufficient evidence to go to the jury. All evidence on this question consisted of the following testimony of plaintiff:

With respect to question 13(b), that is, the term of my contract, the answer I filed in my answers to the interrogatories was: "continuing." I did not explain the word "continuing." Just a moment ago I testified on direct examination that my employment was for my natural life. My answer to question 13.(b), "continuing," seemed similar to for my natural life.

....

According to the agreement I entered into with Mr. Willis and Mr. Pylant for Daycoa my employment with Daycoa was to be for life, that was a term I stated for employment with them. After I stated the term, I mailed them a letter dated September 17, 1963, Plaintiff's Exhibit No. 3. On 20 September Mr. Breidenbach wrote me the letter which is defendants' Exhibit No. 2. I also received with that letter a salesman's agreement and territory that I signed and sent back with my letter, defendants' Exhibit No. 3. The September 20 letter of Mr. Breidenbach doesn't have the terms and conditions that I say were agreed to, not all of them, including the term about life employment. It does say, though, that the terms shall remain in force for a minimum of one year providing I am representing Daycoa, and shall continue in force during sales representation unless changed by mutual agreement. It doesn't say for life, except it says by mutual agreement. As to whether I contend that makes a contract for life, it certainly makes it until we agreed to part, at least, and as long as sales representation, as long as I am still representing them.

Pertinent terms of plaintiff's letter to defendant on 17 September 1963: "[T]hat this agreement shall continue for the rest of my natural life or until terminated by mutual agreement."

Pertinent terms of defendant's letter to plaintiff on 20 September 1963: "[T]hese terms shall remain in force for a minimum of one year provided you are representing Daycoa and shall continue in force during sales representation unless changed by mutual agreement."

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Defendant rejected terms of plaintiff's letter of 17 September 1963 by its response of 20 September 1963. Plaintiff offered no evidence that he opposed the terms of defendant's letter of 20 September 1963. In fact, plaintiff responded to the defendant's letter by completing applications and submitting forms in accord with the terms of the letter. Plaintiff continued to work even after receiving the letter and with knowledge of the terms. This indicates that plaintiff accepted defendant's terms of employment.

[4] In plaintiff's testimony, he adopts the defendant's letter of 20 September 1963 and contends that because the contract is terminable by mutual agreement, it could endure for life.

The wording of the defendant's 20 September 1963 letter is clear. The contract was to remain in force for one year and would be a continuing contract. A continuing contract is not a contract for life. A continuing contract is for an indefinite term. An employment contract which does not fix a definite term is terminable at the will of either party. *Wilkinson v. Mills*, 250 N.C. 370, 108 S.E. 2d 673 (1959); *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976); *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E. 2d 698 (1976); 8 Strong's N.C. Index 3d, Master and Servant § 10. In *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971), the employment contract stated that it was "a regular, permanent job." The Court held that even with this language, employment was "terminable at the will of either party irrespective of the quality of performance by the other party." *Id.* at 259, 182 S.E. 2d at 406. Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking a strike, such a contract may be enforced. *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964). Plaintiff has failed to produce any evidence that he gave any consideration to Daycoa other than the obligation of services to be performed for compensation to be paid by Daycoa. Plaintiff's assignment of error as to the directed verdict on the claim for damages on and after 17 December 1971 is overruled.

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Plaintiff further assigns as error the admission of certain evidence because it was either hearsay, irrelevant, or inadmissible. This case was brought to trial before a judge. In a nonjury case, the rules of evidence are more relaxed than in a jury trial for the reason that a "judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found." 1 Stansbury's N.C. Evidence (Brandis Revision, 1973), § 4a. In the case *sub judice*, the experienced trial judge was able to disregard incompetent evidence. There is a rebuttable presumption that the trial judge disregarded any incompetent evidence. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668 (1958). Nothing in the record rebuts this presumption. As to these assignments, we find no error.

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

JUANITA J. CAMBY, ADMINISTRATRIX OF THE ESTATE OF DONNIE MAX CAMBY v. SOUTHERN RAILWAY COMPANY AND WALTER BYNUM BODENHAMER, JR.

MADELYN S. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF SHERRI WRIGHT CAMBY v. SOUTHERN RAILWAY COMPANY AND WALTER BYNUM BODENHAMER, JR.

No. 7828SC190

(Filed 16 January 1979)

Railroads § 5.7— crossing accident—summary judgment—jury questions as to negligence and contributory negligence

In this action to recover for the deaths of two occupants of an automobile struck by defendant's train at a grade crossing, the trial court erred in entering summary judgment in favor of defendant railroad where there was a conflict in the evidence requiring a determination of the credibility of the witnesses as to who was driving the automobile and whether the train whistle blew as it approached the crossing, and where the rule of the reasonably prudent man was to be applied in determining whether the engineer was negligent in the operation of the train, whether the automobile driver was contributorily negligent, and whether defendant's agent was negligent in giving a signal for the train to proceed toward the crossing.

Camby v. Railway Co. and Wright v. Railway Co.

APPEAL by plaintiffs from *Thornburg, Judge*. Judgment entered 17 December 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 5 December 1978.

These two actions for wrongful death were consolidated for trial. Defendants moved for summary judgment in each case. Defendants and plaintiffs submitted affidavits and other materials which were considered by the trial court.

Defendants' evidence offered in support of the motions for summary judgment tends to show the following: there was a collision between the front of the lead engine of freight train No. 163 of defendant railroad and a 1974 Buick automobile occupied by Donnie Max Camby and his wife, Sherri Camby; the collision occurred about 10:40 a.m. on 14 January 1977 at an on-grade crossing where the east-west main line of the railroad intersects with Dennis Street at Swannanoa, North Carolina; Dennis Street at the intersection runs north and south; the automobile was proceeding north on Dennis Street, the train was going west; Rhonda Gail Robinson and Billy Joe Robinson were in a car near the crossing; Rhonda could see that Donnie Max Camby was driving the Buick, but Billy Joe could not say who was driving, although he saw two people in the Buick; Rhonda did not see the driver look either to the left or right before the collision; they could hear the gong of the crossing signal and see the lights blinking; they heard the train whistle blow one time before the accident; the Buick was going about 10 m.p.h. and did not stop before the collision; there was a gondola car and a box car parked on a parallel storage track about 150 feet west of the crossing; from Dennis Street on the south side of the track, one has vision of the track to the east for 250 yards; the train was going between 35 and 40 m.p.h.; the Buick was owned by Samuel Ernest Camby; the weather was clear and visibility good; there was a building south of the crossing and east of Dennis Street, 103'5" south of the main line track; there were four signal lights south of the main line track, one of the four faced due south, one faced east, and two faced northwest; there were four signal lights north of the main line track, two faced southeast, visible to northbound traffic on Dennis Street approaching the crossing; the bell or gong was operating; the signal light facing due south, located south of the track, was not operating; there were two public crossings about 2,000 feet east of Dennis Street; the train blew two long blasts, one short blast,

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and one long blast for each of these crossings; the same warning was begun about 800 feet east of Dennis Street and continued to impact; the engineer did not see the Buick before impact; the engine headlight was on and the bell ringing; after the wreck Donnie Max Camby was found pinned under the steering wheel with a foot hung under the brake pedal; Sherri Camby was outside the automobile on its right side; railroad agent Hensley knew the signal light south of the main line was out when he gave the green signal for the train to proceed toward the crossing; Hensley's station was located just west of the Dennis Street crossing; a diagram of the crossing was offered.

Plaintiffs' evidence opposing the motions tends to show: Samuel Camby owned the Buick automobile; Donnie Max Camby was his grandson, and he knew Donnie's driver's license was suspended; he told Sherri Camby not to let Donnie drive his car, that she was to drive it; Donnie and Sherri came to his house the morning of the collision; he gave Sherri permission to drive the car and put her in charge of the car; one could drive from his home to the crossing in three or four minutes; the light facing south on the south side of the crossing was not working the day before the accident; Donnie and Sherri walked to his house the morning of the collision; Mrs. Samuel Camby saw Donnie and Sherri leave in the Buick car and Sherri was driving; Sherri said they were going to get his check, get groceries, and eat breakfast; Donnie and Sherri left the Camby home two or three minutes before the collision, they were struck by the train within two minutes after they left the house; Billy Joe Robinson did not hear the train whistle blow until it hit the car; the car was scattered all around; the car stopped about 100 feet from impact; both occupants were in the front section of the car after the collision; the car turned around four or five times and the rear seat was thrown out; the car was completely demolished; Jeffrey Lynn Peterson was working in a warehouse south and west of the crossing and did not hear the train whistle at the time of the collision.

The trial court entered an order finding facts, making conclusions of law, and allowed the motions for summary judgment and dismissed the actions. Plaintiffs appealed.

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Floyd D. Brock, by Jerry W. Miller, for plaintiff appellant Wright. Joel B. Stevenson for plaintiff appellant Camby.

W. T. Joyner and Bennett, Kelly & Cagle, by Harold K. Bennett, for defendant appellees.

MARTIN (Harry C.), Judge.

The rules of law governing motions for summary judgment are fully stated by Justice Moore in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). It would serve no useful purpose to restate them here.

The trial court found facts in its judgment. This practice is not contemplated in summary judgment proceedings. "The rule does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists." *Id.* at 534, 180 S.E. 2d at 830. The question for the court is whether there is a genuine issue as to any material fact. An issue is material if the facts alleged are of such nature as to affect the result of the action. A genuine issue is one which can be maintained by substantial evidence. *Kessing v. Mortgage Corp., supra.*

There is a conflict of evidence requiring a determination of the credibility of witnesses concerning the questions of who was the driver of the Camby automobile, and whether the train whistle blew as it approached the crossing. "If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied." *Id.* at 535, 180 S.E. 2d at 830.

Allegations of negligence and of proximate cause of the engineer in the operation of the train require the application of the standard of the reasonably prudent man to the facts in the case under appropriate instructions from the court. This is also true in order to determine the contributory negligence of the driver of the Buick automobile and whether agent Hensley was negligent in giving the green light to the train under the circumstances existing. In such instances, it usually remains for the jury to make this determination. It is only in the exceptional case that summary judgment can be granted where the rule of the reasonably prudent man is to be applied to determine ultimate fact questions. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972);

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Robinson v. McMahan, 11 N.C. App. 275, 181 S.E. 2d 147, *dis. rev. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971); *Edwards v. Means*, 36 N.C. App. 122, 243 S.E. 2d 161, *dis. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978).

Summary judgment is an extreme remedy. "If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial . . ." *Page v. Sloan, supra* at 708, 190 S.E. 2d at 196. Where there are disputed issues of material facts, the plaintiff still may not carry the day with a jury, but he is entitled to try. The factual truth must be clear and undisputed for summary judgment to be granted. It is improper unless the pleadings, evidence and materials offered show there is no genuine issue as to any material fact and that the moving party has shown he is entitled to judgment as a matter of law. In the case at bar, the defendants have failed to carry this burden.

Reversed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES RAY TRUEBLOOD

No. 781SC737

(Filed 16 January 1979)

1. Homicide § 21.9— drowning—sufficiency of evidence of involuntary manslaughter

Evidence was sufficient for the jury in a prosecution for involuntary manslaughter where it tended to show that defendant, who was sixteen years old and the oldest in a group of boys, pushed deceased off a log into a pond, knowing that deceased could not swim, and that defendant at no time jumped into the water to try to rescue deceased, though he could swim and had rescued his brother shortly before he pushed deceased into the water.

2. Homicide § 15.5— cause of death—admissibility of police officer's testimony

Experienced police officers could properly testify that the deceased died from drowning where the evidence was such that a layman of average intelligence and experience would know what caused the death, the testimony being more in the nature of a fact than an opinion.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 13 April 1978, Superior Court, PASQUOTANK County. Heard in the Court of Appeals 5 December 1978.

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Defendant was charged with and convicted of manslaughter, resulting from the death by drowning of Nelson Williams, a seven or eight year old boy. Facts necessary for decision are set out in the opinion.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Twiford, Trimpi & Thompson, by C. Everett Thompson, for defendant appellant.

MORRIS, Chief Judge.

Defendant's first assignment of error is directed to the court's denial of his motions for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. Defendant contends that the evidence in this case is not sufficient to support a verdict of guilty and not sufficient for submission to the jury. We disagree.

It is elementary that, on motion for nonsuit, the evidence, whether competent or incompetent, must be considered in the light most favorable to the State, and every reasonable inference must be drawn in favor of the State. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977), *cert. denied*, 434 U.S. 924 (1978).

[1] Applying these guidelines, we find that the evidence presented at trial is sufficient to allow the jury to find the following:

On 20 April 1977, deceased and a friend, James Everett, skipped school. After they got out on the street, they saw defendant, a 16 year old boy who had stopped school in the 9th grade. He told them that some other boys were skipping school and had gone down to the Nature Trail at the Knobbs Creek Recreation Center. These other boys were all related to defendant. Deceased and James decided to go to the Nature Trail also. They had on school clothes. Deceased had on long pants. When they got to the Nature Trail, the others were already there. Part of the river runs up in the area behind the Nature Trail. Neither deceased nor James knew how to swim. Both were small and thin. Deceased found some "cut-off" shorts lying on the ground. He took off his school clothes and put on the shorts. He also found an old life

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jacket. He put the life jacket on and went in the edge of the water. After he waded a bit, he came out. One of the youngest of the Trueblood boys went into the water to swim, but when he was "half way up to shore" he got in trouble and defendant, who had also arrived at the site, had to pull him out. There is some conflict in the evidence as to whether defendant grabbed his younger brother's hand or whether he jumped in and swam to him. Defendant said he jumped in and had to swim about 10 feet to reach his brother. In any event, defendant did save his younger brother. When deceased came out of the water after wading, he took off the life jacket, and he and defendant talked "there by the log". Defendant was telling deceased how to swim. He told deceased to move his arms and kick his feet when he was swimming. Deceased then walked out on a log on the bank next to the water. While deceased was standing on the log, defendant walked out on the log and pushed deceased. When deceased hit the water he was moving his arms backward. He was moving away from shore, and his head went under three times. The others asked defendant to save deceased but "he said he couldn't save him, to let him drown". Defendant never jumped off the log to try to save deceased. The water became deeper as one went away from the log. This was not the same place where defendant's younger brother had gone in. Defendant "reached" a stick to deceased but it did not get to deceased. He threw the life jacket, but it missed the mark. This was thrown after deceased had gone under the second time. Defendant had been swimming for about two years and had been swimming in this area only a few days prior to this occurrence. Defendant told the investigating officers that he knew deceased could not swim; that he knew he was the oldest person in the group and that he felt responsible for all the boys who were out there. Deceased was about the same distance from defendant as was defendant's brother Bruce when defendant had jumped in the water and saved Bruce. Bruce was "heavier and a whole lot bigger" than was deceased. Defendant further stated that he knew he should not have pushed deceased off the log and that he knew that pushing him off the log caused him to drown.

In *State v. Williams*, 231 N.C. 214, 56 S.E. 2d 574 (1949), the Court defined involuntary manslaughter as "the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not

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amounting to a felony, or some act done in an unlawful or culpably negligent manner (citations omitted), and where fatal consequences of the negligent act were not improbable under all the facts existent at that time. (Citations omitted.)" 231 N.C. at 215-216, 56 S.E. 2d at 574-575. There the evidence tended to show that defendant and several women and children were bathing in a pond which was shallow near the banks but deepened to 10 or 12 feet in the center. Defendant, a man of some 30 or 35 years of age, approached the group and asked why they did not go out where it was deeper. He then waded out in the water. All the bathers ran out of the pond except deceased. She was about 16 years of age and was holding to a post in water not more than waist deep. Defendant, over her repeated protests that she could not swim, pulled her away from the post. Both fell over in the deep water and she drowned. The Court said:

"There was no evidence of malice, or that the defendant intended to drown the girl, but against her will and over her protest that she could not swim he pulled her into deep water where she drowned. True the defendant came near drowning also but that did not palliate his action. The fatal consequences to Dorothy Lynn Smith under the evidence must be ascribed to the defendant's unlawful and culpably negligent conduct which it could reasonably have been foreseen was likely to result in serious injury. (Citations omitted.)" 231 N.C. at 215, 56 S.E. 2d at 574.

Here there is no real evidence of malice, but in our opinion, the jury could reasonably find from the evidence that deceased's death "must be ascribed to the defendant's unlawful and culpably negligent conduct which it could reasonably have been foreseen was likely to result in serious injury." *Id*; see *State v. Pond*, 125 Me. 453, 134 A. 572 (1926). Defendant's first assignment of error is overruled.

[2] Defendant next assigns as error the court's allowing into evidence testimony that Nelson was in fact dead and that his death resulted from drowning. It is true that authorities differ as to when a witness not a medical expert may express an opinion as to the cause of death, but "the general rule . . . is that the opinion of a nonmedical witness as to the cause of death is admissible if the witness is qualified by experience and observation to give an

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opinion, and the facts to be interpreted are not of such a nature as to render valueless any opinion but that of an expert in a particular field. (Citations omitted). . . . 'There are many instances in which the facts in evidence are such that a layman of average intelligence and experience would know what caused the injuries complained of.' In such case, evidence is admitted upon the ground that it 'is more in the nature of a fact than an opinion.' (Citation omitted.)" *State v. Howard*, 274 N.C. 186, 197-198, 162 S.E. 2d 495, 502-503 (1968).

Here the evidence showed that a young boy who could not swim was pushed off a log; that his floundering carried him away from the log to deep water; that his head bobbed three times, and he was not seen again; that his body was recovered a very short time thereafter. Experienced police officers testified that the body they recovered from the river was a dead body. Certainly, that the child had died from drowning "is more in the nature of a fact than an opinion." *Id.* This assignment of error is without merit.

Finally, defendant contends the court committed prejudicial error in failing to give the jury a legal definition of reasonable doubt. The court is not required to define reasonable doubt absent a request to do so. *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974). There was no request here. This assignment of error is without merit.

In defendant's trial we find

No error.

Judges PARKER and MARTIN (Harry C.) concur.

Jacobs v. Sherard

STATE OF NORTH CAROLINA ON RELATION OF DONALD M. JACOBS, DISTRICT ATTORNEY OF THE EIGHTH JUDICIAL DISTRICT v. WILMAN E. SHERARD, SINGLE; AND LOLA SHERARD CRAWFORD, WIDOW v. DONALD M. JACOBS, JAMES SASSER, ROBERT E. DAVIS, DAVID CARL WILEY, KENNETH PENNINGTON, DONALD PARKER, LEROY LOCKLAIR, WILLIAM TILGHMAN AND BILL UZZELL

No. 788SC194

(Filed 16 January 1979)

Appeal and Error § 16— appeal from dismissal of third-party complaint—jurisdiction of trial court to enforce preliminary injunction

Where the district attorney instituted an action against original defendants to abate a nuisance and obtained a preliminary injunction enjoining original defendants from selling liquor on their premises pending the trial, the original defendants filed a third-party action against the district attorney and certain law officers alleging malicious prosecution, abuse of process and trespass, and original defendants appealed the dismissal of their third-party complaint but did not appeal the preliminary injunction, the superior court retained jurisdiction to enforce the preliminary injunction while the appeal from the dismissal of the third-party complaint was pending. G.S. 1-294.

APPEAL by defendants from *Friday, Judge*. Judgment entered 8 November 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 December 1978.

Plaintiff district attorney filed an action pursuant to Article 1, Chapter 19 of the General Statutes of North Carolina alleging that defendants operated their dwelling house at 411 North John Street, Goldsboro, as a place for the sale of tax-paid whiskey. A preliminary injunction was allowed by Judge Small on 28 May 1976 enjoining defendants from selling liquor on their premises "pending the trial, final determination and judgment."

Defendants answered and filed a third-party complaint against the district attorney and certain law enforcement officers. The third-party complaint alleged malicious prosecution, abuse of process, trespass, and sought recovery of compensation and punitive damages. Third-party defendants moved to dismiss the third-party complaint for failure to state a claim, and motion was allowed on 3 March 1977 by Judge Smith (David R.). The original defendants gave notice of appeal to this Court on 12 May 1977. This appeal was pending in this Court until 18 April 1978 when the dismissal was affirmed.

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On 17 October 1977, plaintiff filed a motion for an order requiring defendants to show cause, if any, why they should not be held in contempt of court for violating the 28 May 1976 preliminary injunction. Defendants were ordered to appear, and a hearing was held at which defendants moved to dismiss on grounds that the Superior Court had been divested of jurisdiction by the previous notice of appeal of the 3 March 1977 order of Judge Smith. Judge Friday denied the defendants' motion, proceeded to hear evidence, and found defendants in willful contempt. Defendants appeal.

Dees, Dees, Smith, Powell & Jarrett, by Tommy W. Jarrett, for plaintiff appellee.

Hulse & Hulse, by Herbert B. Hulse, for defendant appellants.

ERWIN, Judge.

Defendant appellants present one question for our determination: "Did the trial court err in holding that it had jurisdiction in this matter while the same was pending on appeal in the Court of Appeals?" We answer "no," and affirm the judgment entered by the trial court.

G.S. 1-294 provides:

"Scope of stay; security limited for fiduciaries. — When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

Inasmuch as defendants did not appeal the 28 May 1976 preliminary injunction, the Superior Court retained jurisdiction to enforce it.

The facts in this case are controlled by *Green v. Griffin*, 95 N.C. 50, 52 (1886), where our Supreme Court said:

"The defendant insists that the appeal, when perfected, annulled the order for all purposes, and left the parties against whom it was directed as free to act as before it was made.

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If this were so, it is manifest the right to arrest the action of one, committing irreparable damages, by a restraining order, could be easily defeated by taking an appeal, and consummating what was intended, before it could be acted upon in the higher Court. Shade trees could be cut down, property removed out of the jurisdiction of the Court, beyond recovery, or any other wrong, intended to be prevented, perpetrated, so that when a final judgment or perpetual injunction was rendered, it would be vain and useless. The remedy sought by the process might thus become illusory, and success in the suit, followed by no benefit to the aggrieved party."

In *Elliott v. Swartz Industries*, 231 N.C. 425, 426, 57 S.E. 2d 305 (1950), our Supreme Court stated:

"The motion for continuance was overruled and defendant appealed. The court thereupon proceeded to hear the order to show cause upon the evidence introduced, and made an order restraining the defendant from the continued operation of the plant so as 'to emit foul, sickening, noxious and offensive odors until a final determination of this cause.' The defendant excepted to the signing of the order and gave notice of appeal.

The defendant contends that the appeal from denial of his motion to continuance took the case out of the jurisdiction of the court, and that subsequent orders therein were *coram non judice* and should be so declared by this Court. With this the Court cannot agree."

In *Trust Co. v. Morgan-Schultheiss* and *Poston v. Morgan-Schultheiss*, 33 N.C. App. 406, 235 S.E. 2d 693 (1977), *dis. rev. denied*, 293 N.C. 258, 237 S.E. 2d 535 (1977), we held that where a defendant's motion for summary judgment, filed the same day as an answer setting up counterclaims, was directed only to plaintiff's principal action, an appeal from an order allowing defendant's motion for summary judgment did not deprive the court of jurisdiction to enter default judgments on the counterclaims.

If the defendant's contentions are correct, a preliminary injunction would be a worthless and useless document. Once granted, the party or parties against whom it was directed could

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give notice of appeal and continue with the proscribed conduct. This is not our law.

The Superior Court clearly had jurisdiction, and the order holding defendants in willful contempt of court is in all respects valid.

Judgment affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

ALLEN PRESSLEY v. CONTINENTAL CAN COMPANY, INC., ALEXANDER POWERS, AND F. PAUL WOHLFORD

No. 7821SC224

(Filed 16 January 1979)

Libel and Slander § 12.1— employee evaluation report—libel action barred by statute of limitations

Plaintiff's action for libel based on a report placed in his personnel file in October 1972 was barred by the statute of limitations, and there was no continuous publication of the report during the time it was in plaintiff's file nor any republication of the libel beginning in January 1975 when plaintiff discovered the report in his file, since the mere fact that the report was kept in plaintiff's file did not amount to publication, even if the report were potentially available for others to read, and since no one saw the report after plaintiff learned of it except those persons to whom plaintiff showed it.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 25 October 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 November 1978 in Winston-Salem.

At the time of the occurrences giving rise to this action, plaintiff was employed as a machine cleaner by defendant Continental Can Company, Inc.; Wohlford was the plant manager; and defendant Powers was plaintiff's production supervisor. Plaintiff alleges that in October 1972, Wohlford ordered Powers to prepare an employee evaluation report on plaintiff and that the report as prepared contained malicious and libelous remarks as follows: "Allen is many things—racist, socialist, anti-world, sneak, conniving, lazy. . . . Once heavily concerned with [the union] now concentrates on civil rights. I care less of his thoughts & affiliations but

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his output poor. Have tried to motivate—too many bad habits." Plaintiff did not learn that the statements were part of his file until January 1975.

Defendants pleaded the statute of limitations, privilege and publication instigated by plaintiff. Defendants' motion for summary judgment was heard in depositions and granted. Plaintiff appeals.

Westmoreland & Sawyer, by Gregory W. Schiro and Laura F. Sawyer, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by W. F. Maready and Robert J. Lawing, for defendant appellees.

ERWIN, Judge.

Defendants argue that plaintiff's action is barred by the statute of limitations. A libel action must be brought within one year, G.S. 1-54(3), of the date it accrues, which is the date of publication. *Gordon v. Fredle*, 206 N.C. 734, 175 S.E. 126 (1934); *Price v. Penney Co.*, 26 N.C. App. 249, 216 S.E. 2d 154 (1975), *cert. denied*, 288 N.C. 243, 217 S.E. 2d 666 (1975). Here, the statute of limitations is a bar to any action on the original making of the report, which occurred in 1972. However, plaintiff contends that there was continuous publication of the report between October 1972 and February 1975, and republication in 1975, so that there was publication within one year of the commencement of this action in October 1975. We do not agree.

We first consider whether there was continuous publication of the report during the time it was in plaintiff's personnel file. Plaintiff himself testified that to his knowledge, no one except Powers and Wohlford saw the report. The mere fact the report was kept in plaintiff's file does not amount to a publication, even if the report were potentially available for others to read. This situation is analogous to the sending of a libelous postcard through the mail, where it has been held that without a showing that the matter was actually communicated to some third person, there is no libel. "An allegation that others had an opportunity to read a libelous writing is not equivalent to an allegation that it was read by them." *McKeel v. Latham*, 202 N.C. 318, 320-21, 162 S.E. 747, 748 (1932).

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Plaintiff further argues that there was a republication of the libel beginning in January 1975 when he discovered the report in his file. Immediately upon discovering the report, he showed it to Guy Thomas, John Shobert (the industrial relations agent), and Richard Sullivan (the union president). Later that day, Shobert mailed the report to a Mr. Flaherty, the company's industrial relations manager for the Eastern Seaboard. To plaintiff's knowledge, no one other than the authorized persons saw the report. Two weeks later, Flaherty, Sullivan, Thomas, and plaintiff held a meeting concerning the report; plaintiff testified that all those present at the meeting were authorized to see the report.

On these facts, we can find no actionable republication. A publication of a libel, procured or invited by the plaintiff, is not sufficient to support an action for defamation. *Taylor v. Bakery*, 234 N.C. 660, 68 S.E. 2d 313 (1951). Therefore, neither plaintiff's showing of the report to several persons on the day he discovered it nor the reading of the report by those persons present at the later meeting, held at plaintiff's request to discuss the matter, is an actionable republication.

The transmittal of the report from Shobert to Flaherty falls within the defense of qualified privilege. Where a statement is "libel per se," that is, "a false written statement which on its face is defamatory," *Robinson v. Insurance Co.*, 273 N.C. 391, 393, 159 S.E. 2d 896, 899 (1968), there is a presumption of malice. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971). However, a finding of qualified privilege rebuts the inference of malice and makes it necessary for the plaintiff to prove actual malice before he can recover. *Id.*, *Boulogny, Inc. v. Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344 (1967). Qualified privilege is defined by our Supreme Court as follows:

"A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are of good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties

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only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty.' 50 Am. Jur. 2d *Libel and Slander* § 195 (1970). Accord: 53 C.J.S. *Libel and Slander* § 89 (1948); *Hartsfield v. Hines*, *supra* at 361, 157 S.E. at 19."

Stewart v. Check Corp., *supra* at 285, 182 S.E. 2d at 415 (1971). We find that a qualified privilege existed for this communication to Flaherty, *see Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E. 2d 503 (1974), *cert. denied* 285 N.C. 85, 203 S.E. 2d 57 (1974), and that plaintiff has made no showing of actual malice.

Plaintiff's action is barred by the statute of limitations. Judgment for defendants was properly entered.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. GAITHER DEAN PREVETTE, WILLIAM NORMAN STAFFORD, WALTER LEE ST. JOHN, RANDY MARYLON GRIMES, PHILLIP MARK SUTTON, AND FRANCIS EARL WOOD

No. 788SC753

(Filed 16 January 1979)

Criminal Law § 78; Searches and Seizures § 15— standing to challenge validity of search—stipulation improper

In a prosecution for felonious possession of marijuana where the State and defendants stipulated that defendants had standing to challenge the validity of the searches and seizures conducted by officers, and defendants, relying on the stipulation, did not introduce any evidence to establish their standing to object, the case must be remanded for a factual determination of whether defendants had an interest in the searched premises that was protectible under the Fourth Amendment of the U. S. Constitution.

APPEAL by defendants from *Cowper*, Judge. Judgments entered 23 March 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals 5 December 1978.

These six cases of felonious possession of marijuana were consolidated for trial. All defendants moved to suppress the

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evidence seized by the officers. After a hearing pursuant to Section 979(b) of Chapter 15A of the General Statutes of North Carolina, the trial court found facts, made conclusions of law, and denied the motions. Each defendant entered plea of guilty, judgments were entered, and defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Gerrans & Spence, by C. E. Gerrans, for defendants Gaither D. Prevette, William N. Stafford, Walter L. St. John, and Randy M. Grimes.

White, Allen, Hooten, Hodges & Hines, by Thomas J. White and W. H. Paramore III, for defendants Phillip M. Sutton and Francis E. Wood.

MARTIN (Harry C.), Judge.

These appeals result from proceedings under N.C.G.S. 15A-979(b). The evidence produced at the hearing on the motions to suppress tended to show that quantities of marijuana were seized by law enforcement officers in the house, barn, other out-buildings, and from the open fields of property referred to as "Wood's Dairy Farm" in Lenoir County. The officers did not have a search warrant. Defendants Grimes, Prevette, and Stafford were arrested in the house. St. John was arrested in a cornfield, after apparently fleeing from the house. Sutton was arrested in his truck as he approached the area; he was never at the house. The record does not disclose where or when defendant Wood was arrested.

The record on appeal contains the following:

It was stipulated in open Court that the defendants, each and all of them, having standing to challenge the validity of the searches and seizures conducted by the officers on behalf of the State, on Constitutional grounds, and standing to object to the admission into evidence of any and all items, articles, and substances seized, and standing to insist that the same, and evidence of the same, be excluded. Relying upon the foregoing stipulation, no testimony was offered on Voir Dire by the defendants; the defendants' only evidence consisted of Exhibits Nos. 4, 5 and 6, which were offered and

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received in evidence after the identification of said exhibits by State's witnesses on cross examination.

The State and defendants attempted to stipulate as to a question of law. Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. 73 Am. Jur. 2d Stipulations § 5 (1974); 5 Am. Jur. 2d Appeal and Error § 712 (1962). This rule is more important in criminal cases, where the interests of the public are involved. The due administration of the criminal law cannot be left to the stipulations of the parties. *Young v. United States*, 315 U.S. 257, 86 L.Ed. 832 (1942).

Standing to object involves more than rising to address the court. The standing of a defendant to raise a constitutional issue is a question of law. In a case involving the standing of taxpayers to challenge the constitutionality of a statute, our Supreme Court held, "Standing, however, like jurisdiction, cannot be conferred by stipulation. . . . [W]hether the party has standing to attack the constitutionality of a statute is a question of law, which may not be settled by the parties." *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E. 2d 641, 650 (1973). See *Moore v. State*, 200 N.C. 300, 156 S.E. 806 (1931); *Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975).

The record before us does not contain facts necessary to determine whether defendants (or either of them) had an interest in connection with the searched premises that gave rise to "a reasonable expectation of freedom from governmental intrusion" upon those premises. *Mancusi v. DeForte*, 392 U.S. 364, 368, 20 L.Ed. 2d 1154, 1159 (1968). Each defendant has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968). Fourth Amendment rights are personal rights which may not be asserted vicariously. *Alderman v. United States*, 394 U.S. 165, 22 L.Ed. 2d 176 (1969). Defendant must show that he has a legitimate and reasonable expectation of privacy in the areas which were the subject of the search or seizure he seeks to contest. *Rakas and King v. Illinois*, --- U.S. ---, 99 S.Ct. 421, 58 L.Ed. 3d 387 (1978).

Defendants relied upon the stipulation and did not introduce any evidence to establish their standing to object to the search.

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Fairness to defendants will not allow us to deprive them of an opportunity to do so.

Since there has not been any factual determination of whether defendants (or either of them) had an interest in the searched premises that was protectible under the Fourth Amendment of the United States Constitution, we remand the cases to the superior court for this purpose. *Combs v. United States*, 408 U.S. 224, 33 L.Ed. 2d 308 (1972). The superior court upon this determination shall enter an order containing its findings and conclusions. This order shall be certified to this Court. Defendants may file exceptions and assignments of error as to this order if so advised, and the parties may file additional briefs with this Court upon such assignments of error.

Error and remanded.

Chief Judge MORRIS and Judge PARKER concur.

FEDERAL DEPOSIT INSURANCE CORPORATION v. LOFT APARTMENTS LIMITED PARTNERSHIP, BLUE BELL ADVISORS, INC., HAMPTON ADVISORY CORP., FORMERLY KNOWN AS SONNENBLICK-GOLDMAN ADVISORY CORP., CAPITAL INVESTMENT DEVELOPMENT CORP., NORTH AMERICAN MORTGAGE INVESTORS

No. 7810SC210

(Filed 16 January 1979)

Limitation of Actions § 4— wrongful conversion of security interest—accrual of cause of action—action not barred

Plaintiff's claim for the wrongful conversion of its security interest in certain property which was instituted on 7 September 1977 was not barred by the statute of limitations, since the period of the statute began to run when plaintiff's right to maintain the action for the alleged wrong accrued, and plaintiff alleged that the acts constituting conversion occurred "subsequent to September 9, 1974." G.S. 1-52(4).

APPEAL by plaintiff from Order of *Herring, Judge* entered 23 December 1977 in Superior Court, WAKE County. Heard in the Court of Appeals on 6 December 1978.

This is a civil action instituted on 7 September 1977 by issuance of summons and orders extending time to file a complaint.

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On 27 September 1977, a complaint was filed wherein plaintiff sought damages for wrongful conversion of property in which it had a security interest and a judgment declaring the rights of the parties. The complaint alleged, among other things, that on 7 May 1973, Geneva Construction Company ("Geneva") and Loft Apartments Limited Partnership entered into a construction contract for an apartment project; that Geneva executed a security agreement on 29 May 1974 whereby it granted to American Bank and Trust Company ("Bank") a security interest and a continuing lien in all of Geneva's machinery, equipment, fixtures and office furniture, and all of Geneva's inventory; that the security interest was properly perfected; that on 7 August 1974 Geneva filed a petition for reorganization under Chapter 10 of the Federal Bankruptcy Act; that plaintiff, as successor in interest to the Bank with respect to the Bank's claim against Geneva and as attorney in fact for Geneva, is the rightful owner and entitled to possession of the property alleged to be subject to the Bank's security interest; that subsequent to 9 September 1974, defendants converted this property to their own use.

Defendants filed a motion under G.S. § 1A-1, Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted on the grounds that plaintiff's action was brought more than three years after its claim accrued and thus the claim was barred by G.S. § 1-52. No answer appears in the record.

On 23 December 1976, Judge Herring entered an order dismissing plaintiff's action as being barred by the three year statute of limitations in G.S. § 1-52(1) and (4). Plaintiff appealed.

Maupin, Taylor & Ellis, by G. Palmer Stacy, III, for plaintiff appellant.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long, for defendant appellees Hampton Advisory Corporation and North American Mortgage Investors.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellees Loft Apartments, Limited Partnership; Blue Bell Advisors, Inc.; and Capital Investment Development Corporation.

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HEDRICK, Judge.

The one question presented by this appeal is whether the trial court erred in allowing defendant's motion to dismiss plaintiff's action for failure to state a claim upon which relief could be granted pursuant to G.S. § 1A-1, Rule 12(b)(6).

In North Carolina a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim. But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts that could be proved in support of the claim. *Sutton v. Duke*, 277 N.C. 94, 102-103, 176 S.E. 2d 161, 167 (1970); *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975).

When the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under Rule 12(b)(6). *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E. 2d 243, cert. denied, 290 N.C. 555, 226 S.E. 2d 513 (1976); *Teague v. Asheboro Motor Company*, 14 N.C. App. 736, 189 S.E. 2d 671 (1972); Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 608 (1969).

Defendants argue, and the trial court apparently agreed, that plaintiff's claim was barred by three year statute of limitations set out in G.S. § 1-52, which provides:

Within three years an action—

- (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

...

- (4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

Defendants' contentions are summarized in their brief as follows:

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[Defendants] contend that [plaintiff's] rights in the collateral which is the subject of the security agreement in this case can rise no higher than the basic agreement upon which that security interest is founded and that when [plaintiff's] rights under the security agreement became barred by the statute of limitations the rights in the collateral likewise became barred.

Defendants' contentions presuppose that plaintiff's claim is based on the contract, and that plaintiff's action is to recover the property securing the debt. Plaintiff's complaint alleges a claim for damages for wrongful conversion of its security interest in the property. Such an action may be maintained in North Carolina. *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E. 2d 559 (1966); *Credit Corp. v. Satterfield*, 218 N.C. 298, 10 S.E. 2d 914 (1940). Plaintiff's interest in the property arises from the security agreement contract, but its claim is not one "upon a contract, obligation or liability arising out of a contract," and G.S. § 1-52(1) is not applicable.

Since plaintiff's claim is for the wrongful conversion of its security interest in the property, G.S. § 1-52(4) is applicable. The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. *Wilson v. Crab Orchard Development Company*, 276 N.C. 198, 171 S.E. 2d 873 (1970). There can be no conversion until some act is done that is a denial or violation of the plaintiff's dominion over or rights in the property. *Gallimore v. Sink, supra*. Plaintiff has alleged that the acts constituting conversion occurred "subsequent to September 9, 1974." At that time, plaintiff still had an interest in the property securing the debt, notwithstanding defendants' contention that a default occurred on 7 August 1974 under the security agreement as a result of the filing of the petition for reorganization under the federal bankruptcy law. Assuming the truth of the allegations in the complaint, plaintiff has commenced the action within three years of the alleged acts of conversion, and the complaint does not reveal upon its face an insurmountable bar to plaintiff's claim.

The order dismissing plaintiff's complaint is reversed and the cause is remanded to the Superior Court for further proceedings.

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Reversed and remanded.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, NORTH CAROLINA NATURAL GAS CORPORATION, APPLICANT; AND THE PUBLIC STAFF, INTERVENOR APPELLEES v. CF INDUSTRIES, INC. INTERVENOR APPELLANT

No. 7810UC151

(Filed 16 January 1979)

Gas § 1; Utilities Commission § 22— increased storage costs for natural gas—not part of wholesale cost—general rate case required

Charges incurred for increased storage capacity and paid to the natural gas wholesaler are not part of the "wholesale cost" of natural gas within the meaning of G.S. 62-133(f), and the increased cost cannot be reflected in the retail rates automatically without the necessity for fixing the retail rates pursuant to the procedures for a general rate case.

APPEAL by intervenor CF Industries, Inc., from Order of the North Carolina Utilities Commission entered 10 November 1977. Heard in the Court of Appeals on 14 November 1978.

This proceeding was commenced on 7 July 1977 by North Carolina Natural Gas Corporation ("NCNG") for authority to adjust its retail rates for all rate schedules except Rate Schedule No. 7 for natural gas service. By letter dated 7 July 1977, NCNG submitted a tariff filing for Rate Schedule No. 7, the rate under which CF Industries is served. Among the adjustments requested in its application and letter was permission to recover \$870,744 per year in increased costs. The increased costs are attributable to NCNG's increase in its storage service under a contract with the Washington Storage Service which is operated by Transcontinental Gas Pipe Line Corporation. A hearing was held on NCNG's application and tariff filing on 17 August 1977.

The evidence presented at the hearing tended to show the following:

NCNG contracted for additional storage capacity for natural gas at an annual cost of \$870,744, which increased NCNG's stor-

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age capacity from 672,845 Mcf to 2, 141,720 Mcf. The purpose of the increase was to place larger volumes of gas, received for NCNG's account during the summer months, in storage for distribution and sale during the winter heating season.

On 10 November 1977, the Utilities Commission entered an Order requiring all customers of NCNG to share on a proportionally volumetric basis the \$870,744 annual cost for the increased storage capacity. This Order stated in part:

GS 62-133(f) authorizes the Commission to consider increases in cost of gas to North Carolina gas utilities, resulting from increases in wholesale prices, as separate items not requiring the procedures and detailed findings of a general rate case. By increasing its Washington Storage Service by 1,468,875 Mcf from 672,845 Mcf to 2,141,720 Mcf, NCNG will incur an annual increase in its WSS storage capacity charge of \$870,744. The commission is of the opinion that this increase in storage capacity volumes has resulted in an increase in the wholesale cost of natural gas within the meaning of GS 62-133(f).

From the foregoing Order, intervenor CF Industries, Inc., appealed.

Sanford, Cannon, Adams & McCullough, by H. Hugh Stevens, Jr., and Charles C. Meeker, for CF Industries, Inc., appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy for North Carolina Natural Gas Corporation, appellee.

HEDRICK, Judge.

By its one assignment of error, CF Industries contends the "Commission erred in its conclusion that the increase in NCNG's gas storage capacity was an increase in the wholesale cost of gas pursuant to G.S. § 62-133(f)."

G.S. § 62-133(f) empowers the Utilities Commission to permit North Carolina utilities to increase their retail rates for natural gas commensurate with increases in the "wholesale cost" of natural gas without going through the procedures required for a general rate case. This permits utilities to "pass through" periodic wholesale price increases imposed by interstate pipeline companies. G.S. § 62-133(f) provides in pertinent part:

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Unless otherwise ordered by the Commission subsections (b), (c), and (d) [of GS 62-133] shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct.

The sole question thus presented for our review is whether charges incurred for increased storage capacity and paid to the natural gas wholesaler are part of the "wholesale cost" of natural gas within the meaning of G.S. § 62-133(f), so that the increased cost can be reflected in the retail rates automatically without the necessity for fixing the retail rates pursuant to the procedures for a general rate case. We believe such storage service charges are not properly includable in the "wholesale cost" of natural gas supplies.

The purpose of G.S. § 62-133(f) is to allow the retailer to automatically pass on to the consumer changes in the wholesale cost of the natural gas, over which neither the retailer nor the Utilities Commission has control, whenever the natural gas suppliers' price is revised upward or downward, thus avoiding costly and protracted rate proceedings. NCNG argues that the storage service charge is a "wholesale cost" that it "must incur in order to obtain supplies of gas that are adequate to fill the needs of its customers." While we express no opinion as to the necessity of the added storage, it is clear that the decision to increase storage capacity represents a discretionary determination on the part of NCNG and is not a change in the wholesale cost of the gas supplies beyond the retailer's control. Any increase in the retail rates attributable to charges by a wholesaler of natural gas for storage capacity must be apportioned in a general rate case pursuant to G.S. § 62-133(a) through (e).

We hold that the Utilities Commission acted in excess of its statutory authority when it permitted NCNG to pass on additional costs resulting solely from an increase in storage capacity without complying with the statutory procedures required for a general rate case.

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Vacated and remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. TERRY DORSEY

No. 7827SC790

(Filed 16 January 1979)

Assault and Battery § 15.5— self-defense—instruction required

In a prosecution for assault with a deadly weapon with intent to kill, the trial court erred in failing to instruct on self-defense where the evidence tended to show that the victim was brandishing a gun and threatening to kill defendant before defendant was himself handed a pistol by his wife, and the victim shot first.

APPEAL by defendant from *Howell, Judge*. Judgment entered 5 April 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 6 December 1978.

Defendant was indicted for assaulting his neighbor Jerry Sheppard with a .38 caliber pistol with intent to kill inflicting serious injuries. Upon his plea of not guilty, defendant was tried before a jury and found guilty of assault with a deadly weapon inflicting serious injury. From judgment imposing a sentence of imprisonment for not less than two years nor more than five years, defendant appeals.

Attorney General Edmisten by Associate Attorney J. Chris Prather for the State.

Assistant Public Defender Jesse B. Caldwell III, for the defendant.

PARKER, Judge.

Defendant contends *inter alia* that the trial court's failure to instruct the jury on self defense was reversible error. We agree.

It is undisputed that Sheppard was armed with a pistol. The defendant's evidence showed that Sheppard was brandishing this gun and threatening to kill defendant before defendant was himself handed a pistol by his wife. Defendant testified that Shep-

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pard shot first as Doris Ann Dorsey was handing defendant the pistol. Doris Ann Dorsey also testified that Sheppard fired while she was handing defendant the pistol. Defendant's eight year old daughter Vickie Ann Dorsey testified that Sheppard fired first. This evidence raised an issue of self defense in this case, and the trial court was required to instruct the jury accordingly.

New trial.

Judges HEDRICK and ERWIN concur.

RAYMOND BURGESS, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY
SITUATED v. JOSEPH SCHLITZ BREWING COMPANY

No. 7821SC249

(Filed 16 January 1979)

1. Master and Servant § 1—handicapped persons—visual disability

The term "visual disability" as used in G.S. 168-1 includes persons with visual impairments less serious than the "visually handicapped" defined in G.S. 111-11, i.e., those who are totally or functionally blind.

2. Master and Servant § 1—refusal to hire person with glaucoma—cause of action

Plaintiff's complaint alleging that he was denied employment because he has simple glaucoma without any consideration of whether his disability would materially impair his job performance stated a cause of action to enforce rights accruing under G.S. Chapter 168 and the N. C. Constitution. G.S. 168-6.

APPEAL by plaintiff from *McConnell, Judge*. Judgment entered 7 February 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals in Winston-Salem 5 December 1978.

Plaintiff sought employment from defendant, and had been requested to report for a pre-employment physical by the defendant's doctor. At the examination, plaintiff informed the doctor that he had simple glaucoma, a chronic disease of the eyes, which was under control, by use of drugs and regular medical care, and that his vision with eyeglasses was corrected to 20/20. When defendant was apprised of these facts, plaintiff was informed that

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company policy did not allow the hiring of anyone with such a disability and that he would not be hired.

Plaintiff brought this action on his behalf and on behalf of all those similarly situated, contending that the discrimination he allegedly suffered was not directed at him as an individual but was representative of the corporate defendant's policy of refusing to hire individuals with certain disabilities without regard to whether such disabilities impaired or would impair the ability of those individuals to perform the jobs for which they were applying. Plaintiff's action is premised upon the contention that he is a "handicapped person" within the meaning of G.S. 168-1 and is entitled to the protection of G.S. 168-6. Defendant filed a motion to dismiss on the grounds that plaintiff was not a "handicapped person" within the meaning of the statute.

This motion was granted by the trial judge, and from his order dismissing the action plaintiff appeals, assigning error.

Pfefferkorn & Cooley, by William G. Pfefferkorn, Jim D. Cooley and J. Wilson Parker, for the plaintiff.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr. and W. Andrew Copenhaver, for the defendant.

MARTIN (Robert M.), Judge.

The sole question presented to us by this appeal is the sufficiency of plaintiff's complaint. Crucial to our consideration of this issue is the interpretation of G.S. 168-1 and related statutes dealing with handicapped persons. The complaint alleged that the plaintiff had been denied employment solely because of his glaucoma, that the defendant had a long-standing policy of denying employment to persons situated similarly to himself, and that his disability did not impair his ability to perform job duties.

We quote the pertinent statutes below:

§ 168-1. Purpose and definition. —The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment. The definition of "handicapped persons" shall include those individuals with physical, mental and visual disabilities. For the purposes of this Article the definition of "visually handicapped" in G.S. 111-11 shall apply. (1973, c. 493, s. 1.)

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§ 168-2. Right of access to and use of public places. —Handicapped persons have the same right as the ablebodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and all other buildings and facilities, both publicly and privately owned, which serve the public. (1973, c. 493, s. 1.)

§ 168-3. Right to use of public conveyances, accommodations, etc. —The handicapped and physically disabled are entitled to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes of transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons. (1973, c. 493, s. 1.)

§ 168-6. Right to employment. —Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved. (1973, c. 493, s. 1.)

§ 168-8. Right to habilitation and rehabilitation services. —Handicapped persons shall be entitled to such habilitation and rehabilitation services as available and needed for the development or restoration of their capabilities to the fullest extent possible. Such services shall include, but not be limited to, education, training, treatment and other services to provide for adequate food, clothing, housing and transportation during the course of education, training and treatment. Handicapped persons shall be entitled to these rights subject only to the conditions and limitations established by law and applicable alike to all persons. (1973, c. 493, s. 1.)

§ 168-9. Right to housing. —Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or

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have the authority, to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen. Nothing herein shall be construed to conflict with provisions of Chapter 122 of the General Statutes. (1975, c. 635.)

The definition of "visually handicapped" persons found in G.S. 111-11 and incorporated by reference in G.S. 168-1 is as follows:

§ 111-11. Definition of visually handicapped person. —For purpose of this Chapter [Ch. 111, Aid to the Blind], visually handicapped persons are those persons who are totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential. (1935, c. 53, s. 10; 1939 c. 124; 1971, c. 1215, s. 3.)

Chapter 168 has three sections which employ the term "visually handicapped":

§ 168-4. May be accompanied by guide dog. —Every visually handicapped person shall have the right to be accompanied by a guide dog, especially trained for the purpose, in any of the places listed in G.S. 168-3 provided that he shall be liable for any damage done to the premises or facilities by such dog. (1973, c. 493, s. 1.)

§ 168-5. Traffic and other rights of persons using certain canes. —The driver of a vehicle approaching a visually handicapped pedestrian who is carrying a cane predominately white or silver in color (with or without a red tip) or using a guide dog shall take all necessary precautions to avoid injury to such pedestrian. (1973, c. 493, s. 1.)

§ 168-7. Guide dogs. —Every visually handicapped person who has a guide dog, or who obtains a guide dog, shall be entitled to keep the guide dog on the premises leased, rented or used by such handicapped person. He shall not be required to pay extra compensation for such guide dog but shall be liable for any damage done to the premises by such a guide dog. (1973, c. 493, s. 1.)

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[1, 2] Defendant has vigorously argued that as the term "visually handicapped" is used in Chapter 168, and its definition from Chapter 111 is incorporated by reference, the only classes of persons with "visual disability" included in Chapter 168's protective umbra would be the "visually handicapped"—those persons who are either totally or functionally blind. Plaintiff, however, contends that the term "visual disability" as used in G.S. 168-1 includes as its most serious gradation the "visually handicapped" as defined in G.S. 111-11, but also includes persons with visual impairments less serious than those encompassed by the term "visually handicapped." We note that this is a remedial statute, and should be construed broadly rather than narrowly to achieve its purposes. *See*, Sutherland's Statutes and Statutory Construction, Vol. 3, pp. 29, 32. *Accord*, *Wilmington Shipyard v. North Carolina State Highway Commission*, 6 N.C. App. 649, 171 S.E. 2d 222 (1970). In view of this recognized principal of statutory construction, we decline to accept the defendant's narrowly restrictive reading of G.S. 168-1, and conclude that the trial judge's order dismissing the complaint must be reversed. To do otherwise would be to render meaningless the protection of G.S. Chapter 168 to a number of persons who have serious visual disabilities but are nonetheless not so severely impaired as provided for in Chapter 111 and specifically G.S. 111-11.

It seems clear to us that the Legislature intended to grant broad protection of basic rights to all persons with any type of disability, and additionally sought to grant particular protection to an especially disabled group (the "visually handicapped") by three sections dealing with that group (as defined in G.S. 111-11): G.S. 168-4, 5 and 7. "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 80, 213 S.E. 2d 291, 295 (1975). A contrary holding would, it appears to us, operate to defeat the objectives of this remedial chapter and would be contrary to the language employed and intent manifested by the Legislature.

The United States Department of Health, Education and Welfare, in its regulations issued pursuant to the Rehabilitation Act of 1973 (29 USC § 706) defined "handicapped person" as "... any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a

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record of such an impairment, or (iii) *is regarded as having such an impairment.*" (Emphasis supplied.) Taking as true the allegations of the plaintiff, as we are required to do on a motion to dismiss a complaint for failure to state a claim, it is apparent that the defendant viewed the plaintiff as being under some type of disability, and that the defendant denied employment to plaintiff for this reason without any consideration of whether the disability would materially impair plaintiff's job performance. It is this type of alleged discrimination against which the General Assembly intended the protection of Chapter 168. Otherwise, many persons suffering from chronic diseases or disabilities could be arbitrarily denied employment opportunities even though their disabilities would not have any effect on their job performance.

Accordingly, we hold that the plaintiff's complaint sufficiently stated a cause of action to enforce rights accruing by virtue of G.S. Chapter 168 and the North Carolina Constitution. The order of the trial court dismissing the plaintiff's complaint is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Judges VAUGHN and ARNOLD concur.

ANN A. LINDER v. THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA

No. 7811SC129

(Filed 16 January 1979)

Insurance §§ 50, 67.2— death by accidental means—insured's shooting of self—causal factor—presumption of accidental means—sufficiency of evidence

In this action to recover under a policy providing coverage for death by "external, violent and accidental means," the pulling of the trigger discharging an automatic pistol held by the insured, not the raising of pistol, was the causal factor in insured's death; furthermore, plaintiff was entitled to a presumption that the insured's death was caused by accidental means where her evidence was not wholly inconsistent with a finding that, although insured intentionally aimed the gun at his own head, the gun accidentally triggered through a mischance, slip or mishap, and plaintiff's evidence was sufficient for

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the jury on the strength of such presumption and evidence suggesting that insured had no reason to intend to shoot himself.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 14 September 1977 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 29 November 1978.

Plaintiff, as beneficiary of an insurance policy insuring the life of her deceased husband, instituted this action to recover, in addition to \$36,750 already paid to her by defendant, \$8,400 plus interest claimed to be due under the employee group accidental death and dismemberment policy. The policy in relevant part provides as follows:

"BENEFITS—If the Employee, while insured for Employee Group Accidental Death and Dismemberment Insurance under the Group Policy, sustains bodily injuries effected solely through external, violent and accidental means, and, within ninety days after such injuries are incurred, suffers the loss of life, sight or limb as a direct result of such injuries and independently of all other causes, the Insurance Company will, subject to the provisions hereinafter stated, pay in one sum to the Employee, if living, otherwise to the Beneficiary designated by the Employee, the amount provided for such loss."

The following contractual exclusions apply to insured's coverage:

"EXCLUSIONS AND REDUCTIONS.—The Employee Group Accidental Death and Dismemberment Insurance does not cover any loss which results from or is caused directly or indirectly, by (a) suicide, while sane or insane; or . . ."

It has been stipulated that plaintiff is the named beneficiary in the policy and that notice of death was given as required.

Plaintiff's evidence tended to show that the insured Leonard Ray Adkins and plaintiff, formerly Ann Adkins, were married and residing in Cary on the date of the insured's death. Plaintiff and insured were both employed. No children were born of the marriage although they thought plaintiff was pregnant at that time.

On 30 June 1973, plaintiff spent the day with her parents at their home in Pine Level. Plaintiff left the insured early that morning so he could spend the day with his brother and sister-in-

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law. He drove with them to Pine Level late in the afternoon to bring plaintiff back to Cary for dinner and then to see off Leonard's brother and sister-in-law at the airport. The plaintiff testified that when she saw insured early that morning and after he arrived at Pine Level, "He was joking and making airy, free comments, which was his nature." On the way home from the airport, plaintiff and insured discussed attending a movie. Plaintiff insisted that she had a headache and preferred not to attend the movie. A disagreement ensued. After plaintiff and the insured arrived home, plaintiff sat down on the couch, and the insured sat nearby in a chair as they talked for a few minutes. "He was calm at that time." He then went into the kitchen and returned to the room with a .25 caliber automatic handgun which he tossed from hand to hand. The insured asked, "We are still not going to the movie tonight?" Plaintiff answered, "No." While about two feet from plaintiff, insured started raising the handgun with his right hand and asked in what plaintiff described as a joking tone of voice, "Do you want me to do this?" Plaintiff looked away as the gun was being raised and answered, "No." She then heard the gun discharge and saw insured fall to the floor.

Plaintiff testified that at the time of the incident she and the insured "owed bills on a couple of charge accounts", that insured was working at the North Carolina State University Computer Center and attending school at night, and that he had recently received a promotion at the computer center. David B. Pickens, who was best man at plaintiff's and insured's wedding and who had known the insured for roughly five years, testified that they were "good friends" and spent all their working hours together. Pickens could not recall the insured ever having mentioned any thoughts of suicide.

The gun that killed the insured was a .25 caliber automatic pistol which was kept in a kitchen cabinet over the stove in the insured's house. Plaintiff had seen the gun before when insured took it out for cleaning. At that time he demonstrated to plaintiff how to use the weapon. The plaintiff knew that the cartridge clip was usually kept in a kitchen drawer. Plaintiff testified, "As far as I know the clip was never replaced [in the gun after cleaning it] because I saw the clip sometime later in a kitchen drawer." There is no evidence that the clip was in the gun at the time it discharged, fatally wounding insured.

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At the conclusion of plaintiff's evidence, defendant's motion for a directed verdict was denied and the case was submitted to the jury on the following issue: "Was the death of Leonard Ray Adkins, Junior, on June 30, 1973, a direct result of bodily injuries effected solely through external violent means and accidental means independently of all other causes?" The jury was unable to reach a unanimous verdict. The trial court, after reconsidering the motion for directed verdict, directed entry of judgment for the defendant. From the entry of judgment for defendant, plaintiff appeals.

Knox V. Jenkins, by James R. Lawrence, Jr., for plaintiff appellant.

Emanuel and Thompson, by W. Hugh Thompson, for defendant appellee.

MORRIS, Chief Judge.

Plaintiff assigns as error the trial court's entry of a directed verdict in favor of defendant insurance company. The court concluded that the plaintiff's evidence failed to establish that insured's death occurred under circumstances within the insuring provisions of the policy.

The burden is upon plaintiff, as named beneficiary in the insurance policy, to produce evidence sufficient to bring insured's death within the policy's insuring provisions. *Barnes v. Insurance Co.*, 271 N.C. 217, 155 S.E. 2d 492 (1967). Therefore, in reviewing the propriety of the directed verdict, we must determine if the evidence taken in the light most favorable to the plaintiff negates the possibility that insured died "solely through external, violent and accidental means". *Id.*; *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438 (1959).

Our courts continue to draw a critical distinction between the terms "accidental death" and death by "external, violent and accidental means". The distinction is explained by our Supreme Court in *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687 (1941). The following language from that decision has often been quoted with approval by our Courts:

"'Accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'ac-

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cidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation." 220 N.C. at 150, 16 S.E. 2d at 688.

In *Henderson v. Indemnity Co.*, 268 N.C. 129, 150 S.E. 2d 17 (1966), Branch, J., explained the rule as follows:

"... although the results of an intentional act may be an accident, the act itself, that is, the cause, where intended, is not an 'accidental means,' that where an unusual or unexpected result occurs by reason of the doing by the insured of an intentional act, with no mischance, slip or mishap occurring in doing the act itself, the ensuing death or injury is not caused by 'accidental means.'" 268 N.C. at 132, 150 S.E. 2d at 19.

In order to apply the established law to the facts of this case, it is first necessary to isolate the motivating, operative, and causal factor in the insured's death. We conclude that on the evidence in this case the causal factor is the pulling of the trigger discharging the automatic pistol held by the insured. We draw the line at this point in the causal chain of events, not because we are fully satisfied with the logic of our analysis, but to avoid infinite legal hair-splitting necessitated by the impractical and archaic state of our law. Nevertheless, we specifically reject any analysis that would establish the raising of the handgun as the causal factor, even assuming insured intentionally aimed it at his own head. Clearly, intentionally pointing a gun at one's own head, whether the gun is known to be loaded or "unloaded", is careless conduct. And because defendant did not present evidence nor did he request that the question of suicide be submitted to the jury, it is apparent that the defense is relying upon this careless conduct of insured to defeat the beneficiary's right of recovery. However, the policy language upon which defendant relies does not specifically exclude coverage because of insured's unnecessary exposure to danger as did the policy in *Oakley v. Casualty Co.*, 217 N.C. 150, 7 S.E. 2d 495 (1940). The insured's unnecessary exposure to danger does not necessarily remove him from the coverage of this "accidental means" policy. As we understand the

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law, even when an insured exposes himself or herself to reasonably foreseeable danger, if the ultimate cause factor is a "mischance, slip or mishap occurring in doing the act" (*Henderson v. Indemnity Co.*, 268 N.C. at 132, 150 S.E. 2d at 19), the resulting injury is caused by "accidental means" although coverage may be excluded by other policy provisions.

Plaintiff has produced evidence which tends to suggest that the gunshot may have been unintentional. Because her evidence is not wholly inconsistent with a finding that the gun may have been accidentally triggered, through a mischance, slip, or mishap, she is entitled to a presumption that the means were accidental, "'since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person'". *Barnes v. Insurance Co.*, 271 N.C. at 219-220, 155 S.E. 2d at 494. On the strength of that presumption and because varying inferences can be drawn from the evidence suggesting that insured had no reason to intend to shoot himself, the plaintiff is entitled to have her case resolved by a jury.

Because plaintiff is entitled to a new trial, we need not consider her argument that the trial court was without authority to enter the directed verdict after declaring a mistrial.

Reversed.

Judges WEBB and MARTIN (Harry C.) concur.

DONALD A. SEDERS v. EDWARD L. POWELL, COMMISSIONER OF DIVISION OF
MOTOR VEHICLES

No. 7818SC228

(Filed 16 January 1979)

1. Automobiles § 126.3— willful refusal to take breathalyzer test—elapse of time while waiting for attorney's call

The trial court properly found that petitioner "willfully" refused to submit to a breathalyzer test within the thirty minute period mandated by G.S. 20-16.2(a)(4) where petitioner was advised that he had a right to call an attorney and select a witness to view the test but that the test could not be delayed for a period in excess of thirty minutes, petitioner refused to take the

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test until he talked with his attorney, and the time elapsed while petitioner was waiting for an attorney to return his call, it not being essential for the State to show that petitioner was made aware of the passage of time in order for his refusal to be willful.

2. Automobiles § 126.4; Constitutional Law § 40— breathalyzer test—no constitutional right to counsel

Petitioner had no Sixth Amendment right to confer with counsel prior to making a decision as to whether he would take a breathalyzer test.

3. Automobiles § 126.3— breathalyzer test—thirty minute period to contact counsel—due process

Petitioner's right to due process was not denied by the statute giving him a period of thirty minutes within which to contact an attorney before submitting to a breathalyzer test since any right to consult an attorney was solely a matter of statutory right, and the legislature was not required to permit an accused any time at all in which to attempt to contact an attorney prior to taking the breathalyzer test. G.S. 20-16.2(a)(4).

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 26 September 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 29 November 1978.

This is a civil action challenging the revocation of plaintiff's driving privileges for willfully refusing to submit to a breathalyzer test in violation of G.S. § 20-16.2. Upon receiving an order of revocation from the Division of Motor Vehicles, the plaintiff requested and was granted an administrative review by a hearing officer of the Division of Motor Vehicles. From an order sustaining the action of the Division of Motor Vehicles, plaintiff appealed to the Superior Court for a *de novo* hearing. The evidence adduced at the hearing in Superior Court tended to show the following:

On 7 September 1975, Donald Seders had a few drinks while watching a football game at a friend's house. As he was driving home around 3:00 p.m., his car slid on the road and he was stopped by State Trooper Philip R. Wadsworth. Trooper Wadsworth smelled "a strong odor of alcohol about the defendant" and placed him under arrest for driving while intoxicated at 3:05 p.m. Trooper Wadsworth then took Seders to Greensboro in order to have a breathalyzer test. At 3:30 p.m., State Trooper R. D. Jacobs, who was on duty at the breathalyzer room, read Seders his "breathalyzer rights" in accordance with G.S. § 20-16.2(a), including the following: "You have the right to call an attorney and

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select a witness to view for you the testing procedures, but the test shall not be delayed for this purpose for a period in excess of thirty minutes from the time you are notified of your rights." After being read these rights, Mr. Seders unsuccessfully attempted to call several lawyers. He was, however, able to get in touch with the wife of a lawyer whom he knew, and she assured him that she would get her husband to call him back. Seders was requested to take the breathalyzer test three times, but he refused each time and informed Trooper Jacobs that he was not going to take it until he had talked with his attorney. At 4:01 p.m. Trooper Jacobs wrote up Seders as having refused to take the test and dismantled the breathalyzer machine. About ten minutes later, Seders received a telephone call. After completing the call, he informed Trooper Jacobs that he had consulted with his lawyer and was ready to take the test. Trooper Jacobs informed Seders that he had dismantled the machine and refused to administer the test to him.

After hearing the evidence, the judge found that "the plaintiff, without just cause or excuse, voluntarily, understandingly and intentionally refused to submit to the breathalyzer test within the time mandated by G.S. 20-16.2(a)(4)" and entered an order affirming the revocation order. Plaintiff appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd, for the plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for the State.

HEDRICK, Judge.

[1] By assignment of error number one, plaintiff contends that the evidence is insufficient to support the trial court's finding that the plaintiff willfully refused to submit to the breathalyzer test. Plaintiff argues that his refusal to take the test cannot be considered willful because it resulted not from any intentional act on his part but rather as a result of his accidentally allowing the thirty minute period to elapse while waiting for his attorney to contact him. Plaintiff argues that it is essential for the State to show that he was made aware of the passage of time in order for his refusal to be willful. We disagree.

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In *Creech v. Alexander*, 32 N.C. App. 139, 143, 231 S.E. 2d 36, 38, cert. denied, 293 N.C. 589, 239 S.E. 2d 263 (1977), a case that is factually similar to the present one, the court held:

Once the breathalyzer operator fully informed petitioner of his rights with regard to the breath test, there certainly was no obligation upon him to remind petitioner of the effect of his refusal to submit to the test. Petitioner's delay in taking the test, after being advised of the effect of his refusal, was at his own peril.

This assignment of error has no merit.

[2] Plaintiff next contends that in addition to the statutory right "to call an attorney" granted by G.S. § 20-16.2(a)(4), he has a constitutional right granted by the Sixth Amendment to confer with counsel prior to making a decision as to whether he would take the breathalyzer test, and that in the present case he was denied a reasonable opportunity to consult with counsel prior to making his decision.

Plaintiff has no right to counsel under the Federal Constitution in this situation. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); accord, *Price v. North Carolina Department of Motor Vehicles*, 36 N.C. App. 698, 245 S.E. 2d 518 (1978). With virtual unanimity, courts of other states that have confronted this question have held that an individual has no right to counsel before deciding whether to submit to a breathalyzer test because the resulting proceedings for the suspension of a driver's license are civil or administrative in nature, rather than criminal, e.g., *Goodman v. Orr*, 19 Cal. App. 3d 845, 97 Cal. Rptr. 226 (1971); *State v. Palmer*, 291 Minn. 302, 191 N.W. 2d 188 (1971); *Lewis v. Nebraska State Dept. of Motor Vehicles*, 191 Neb. 704, 217 N.W. 2d 177 (1974); *Capretta v. Motor Vehicles Division*, 29 Or. App. 241, 562 P. 2d 1236 (1977), or because the driver is deemed to have consented to the test when he operates a motor vehicle on the State's highways, e.g., *State v. Allen*, 14 N.C. App. 485, 188 S.E. 2d 568 (1972); *Deaner v. Commonwealth*, 210 Va. 285, 170 S.E. 2d 199 (1969). This assignment of error has no merit.

[3] Finally, plaintiff argues that requiring him to submit to the breathalyzer test "within exactly thirty minutes of the time he was warned of his statutory rights constituted a violation of [his]

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rights to due process of law in that such a time limitation is irrational and arbitrary."

In the present case, however, the plaintiff has no constitutional right to the assistance of counsel prior to deciding whether to submit to the breathalyzer test. Any right to consult with an attorney is therefore solely a matter of statutory right. As the legislature is not required to permit an accused any time at all in which to attempt to contact an attorney prior to taking the test, we fail to see how a statute granting an accused thirty minutes to "call an attorney" can violate plaintiff's due process rights. We further reject any implication in *Price v. North Carolina Department of Motor Vehicles*, *supra*, that a person would have more than thirty minutes in which to telephone his attorney. We think the statute clearly expresses the legislative intent to place a thirty minute limitation on the time that a breathalyzer test may be delayed while an individual telephones his attorney. Plaintiff, in this case, had no right to delay the test in excess of thirty minutes while waiting for his attorney to return his call. His declination to take the breathalyzer test was thus a willful refusal under G.S. 20-16.2.

For these reasons, the decision of the trial court in upholding the revocation of plaintiff's driving privileges is affirmed.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. EDWARD LEE TISE

No. 7818SC885

(Filed 16 January 1979)

Criminal Law § 117— failure to charge on character evidence—absence of request—charge on credibility

The trial court was not required to instruct the jury to consider defendant's character evidence as bearing upon his credibility and as substantive evidence absent a request for such an instruction even though the court charged upon the credibility of witnesses in general and one aspect of defendant's character evidence related to the credibility of defendant's testimony.

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APPEAL by defendant from *Barbee, Judge*. Judgments entered 3 May 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals in Winston-Salem, on 6 December 1978.

Defendant was convicted, as charged, of failing to stop his vehicle after a collision resulting in personal injury. [G.S. 20-166(a)]. He was also charged with felonious assault with an automobile [G.S. 14-32(a)], but was found guilty of assault inflicting serious injury [G.S. 14-33(b)(1)]. Defendant appeals from judgments imposing consecutive sentences of two years' imprisonment.

The evidence for the State tended to show that the wife of Logan Brandon, the victim, operated Peacock Massage Parlor on premises adjoining the home of the defendant. About 10:00 p.m. on 28 May 1977 Brandon went to the Parlor to see his wife. He saw defendant standing in his yard with a pistol in his hand. He left the premises in his small sports car, followed closely by defendant in his station wagon. Defendant drove his vehicle into the rear of the Brandon car three times, finally knocking the Brandon car off the road, damaging the car. The Brandon car was traveling at a speed of 100 miles per hour. Brandon was rendered unconscious and was hospitalized for two weeks while being treated for spine fractures and cuts and bruises about the neck and head.

Defendant denied the charges and offered alibi and character evidence.

Attorney General Edmisten by Assistant Attorney General Mary I. Murrill, Deputy Attorney General William W. Melvin and Associate Attorney Lucien Capone III for the State.

Byerly & Byerly by W. B. Byerly, Jr. for defendant appellant.

CLARK, Judge.

First, defendant assigns as error the failure of the trial court to instruct the jury to consider defendant's character evidence as bearing upon his credibility and as substantive evidence. The defendant did not request such instruction. The trial court did instruct the jury on credibility of witnesses in general, using the North Carolina Pattern Jury Instructions For Criminal Cases (101.15).

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The defendant testified and also offered evidence of his good character. Therefore, this evidence may be considered both as affecting the credibility of his testimony and as substantive evidence on the question of guilt or innocence. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954); *State v. Davis*, 231 N.C. 664, 58 S.E. 2d 355 (1950). But the dual aspect of defendant's character evidence is a subordinate feature of the case, and the court is not required to so instruct the jury in the absence of a request. *State v. Scoggins*, 225 N.C. 71, 33 S.E. 2d 473 (1945). An instruction as to credibility relates to a subordinate feature of the case and the trial court is not required to charge thereon absent a request. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. denied* 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975).

But defendant relies on the rule that when the court undertakes to charge on a subordinate feature of the case it must do so accurately and completely. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977). The application of this rule by appellate courts of this State is illustrated by two cases in which defendant testified and offered character evidence. In *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951), the State offered evidence of the good character of two State's witnesses, and defendant testified and offered evidence of his good character. It was held that the trial court erred in instructing the jury that all the character evidence must be considered alike because the State's evidence was relevant only as to credibility but the defendant's evidence was relevant both as to credibility and as substantive evidence. In *State v. Jones*, 35 N.C. App. 388, 241 S.E. 2d 523 (1978), where defendant testified, it was held reversible error for the trial court to instruct the jury that character evidence offered in his behalf could be considered as substantive evidence without additionally instructing that it could also be considered as bearing upon his credibility.

The case *sub judice* is distinguishable from *Bridgers* and *Jones*. In those two cases the trial court undertook to instruct on character evidence but erred in instructing on only one of the dual aspects of character evidence, thus violating the general rule that when the trial court undertakes to charge on a subordinate feature of the case it must do so accurately and completely. In the case before us the trial court did not charge on character evidence but only on credibility of witnesses in general.

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Though the credibility of witnesses in general and the dual aspects of a defendant's character evidence are both subordinate features of the case, the two are not so closely related that a charge on the first requires the trial court to instruct on the latter without request, even though one aspect of the defendant's character evidence relates to the credibility of defendant's testimony. The defendant has the burden of requesting an instruction on the dual aspects of the defendant's character evidence. Under some circumstances complete instructions on a subordinate feature of the case may be harmful to the defendant. He has the burden of determining whether such instructions would be advantageous to him, and, if so, to so request. The burden is not an unconscionable one.

Defendant's other assignments of error relate to the instructions of the trial court. We have carefully examined these assignments of error and find that the trial court accurately defined and explained all elements of the offenses charged and the appropriate lesser offenses thereof and properly explained the law in compliance with G.S. 1-180.

We conclude that defendant had a fair trial, free from prejudicial error.

No error.

Judges MITCHELL and WEBB concur.

DAVID J. MARTIN AND WIFE, MARILYN B. MARTIN v. DR. L. CARL LILES
AND W. G. PARKER, TRUSTEE

No. 7710SC1048

(Filed 16 January 1979)

**Mortgages and Deeds of Trust § 40—foreclosure enjoined by bankruptcy court—
injunction dissolved—absence of notice to trustees**

Where plaintiffs were notified of a foreclosure sale of their property under a deed of trust, the property was sold but the trustee was enjoined by a federal bankruptcy court from delivering the deed, the bankruptcy court's restraining order was dissolved after a hearing at which plaintiffs were represented by counsel, and the trustee delivered the deed ten days later,

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there was no requirement that plaintiffs be notified that the order had been entered dissolving the restraining order in order for the trustee's deed to be valid.

APPEAL by plaintiffs from *Canaday, Judge*. Judgment entered 26 July 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1978.

The plaintiffs have appealed from a summary judgment in favor of the defendants. The following facts are not in dispute. In 1968, plaintiff executed a note secured by a deed of trust on the subject real property, in which deed of trust defendant Parker was trustee and defendant Liles was the beneficiary. Following plaintiffs' default on said note, defendant Parker, as trustee at the direction of defendant Liles, holder of the note, initiated foreclosure proceedings under which the subject real property was offered for sale by defendant Parker on 8 July 1975. Defendant Liles became the last and highest bidder in an amount which equaled the total of the balance due on the note secured by the deed of trust, commissions, fees and expenses. Defendant Parker filed a report of sale on 8 July 1975. On 11 July 1975, the United States Court for the Eastern District of North Carolina entered a restraining order in a bankruptcy proceeding staying any further action in the foreclosure. Defendant Liles then made a motion in the bankruptcy proceedings to dissolve the restraining order. A hearing on this motion to dissolve was heard on 8 December 1975 in the Bankruptcy Court. Defendant Parker represented defendant Liles at this hearing and Harold Russell, Jr., Esq. represented the plaintiffs. On 18 December 1975, the Bankruptcy Court entered an order dissolving the restraining order of 11 July 1975. On 29 December 1975, defendant Parker, as trustee, delivered a deed to the said property to defendant Liles.

The plaintiffs brought an action to have the deed set aside and for damages. Upon the above facts being established either by the pleadings or by answers to interrogatories, the court granted the defendants' motion for summary judgment.

Maupin, Taylor and Ellis, P.A., by Richard C. Titus, for plaintiff appellants.

W. Gale Parker, for L. Carl Liles and W. G. Parker, Trustee, defendant appellees.

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WEBB, Judge.

The plaintiffs contend summary judgment was not proper in this case because in sworn answers to interrogatories, the plaintiffs stated they did not have notice that the Bankruptcy Court had dissolved the restraining order which enjoined the foreclosure. If this is a material issue of fact, we must reverse. We hold this is not a material issue and the summary judgment is affirmed.

The appellants were notified the property would be sold under a foreclosure sale; the property was sold, but the trustee was enjoined by the Bankruptcy Court from delivering the deed; after a hearing at which the plaintiffs were represented by counsel, the restraining order was dissolved. The trustee then waited ten days before delivering the deed. We hold there was no requirement that the plaintiffs be notified that the order had been entered dissolving the restraining order. The plaintiffs were as able as the defendants to find out when the order was entered. They knew the matter was under consideration by the Bankruptcy Court and were in a position to take whatever action they deemed appropriate to protect themselves. They cannot now complain because they took no action.

There being no genuine dispute as to any material fact, summary judgment is appropriate. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Affirmed.

Judges ARNOLD and MITCHELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 JANUARY 1979

IN RE HACKETT No. 7818SC322	Guilford (77SP551)	No Error
SCHILLING v. KUSH-N-KART No. 7821DC225	Forsyth (76CVD2496)	Dismissed
STATE v. BLACK No. 7811SC433	Harnett (77CRS7045)	No Error
STATE v. FOULKS No. 7818SC674	Guilford (77CRS38911) (77CRS38912)	No Error
STATE v. McKINNEY No. 7829SC797	McDowell (77CR5743) (78CR47)	No Error
STATE v. MILLER No. 7821SC812	Forsyth (77CR43866)	No Error

FILED 16 JANUARY 1979

GUILFORD COUNTY v. BOYAN No. 7818SC417	Guilford (76CVS6388)	Affirmed
INTERNATIONAL MINERALS v. GADDY No. 7820SC14	Union (76CVS34)	Affirmed
STATE v. AMMONS No. 7812SC787	Cumberland (78CRS3774)	No Error
STATE v. BROWN No. 7822SC657	Davie (77CRS1874) (77CRS1876)	No Error
STATE v. HALL No. 7819SC494	Randolph (77CRS3172)	No Error
STATE v. HUNTLEY No. 7819SC808	Cabarrus (78CRS1378) (78CRS1378-A) (78CRS2138)	No Error
STATE v. JEFFUS No. 7818SC841	Guilford (77CRS29591)	No Error
STATE v. KING No. 788SC693	Wayne (78CR1000)	No Error
STATE v. MITCHELL No. 7817SC702	Surry (77CR3881)	Affirmed

STATE v. MULWEE
No. 7817SC778

Stokes
(74CR215)

Appeal Dismissed

STATE v. NELSON
No. 7817SC754

Stokes
(77CRS3844)

No Error

TUCKER v. TUCKER
No. 7818DC222

Guilford
(73CVD5312)

Affirmed

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SARA COZART AND T. MAURICE COZART v. MARVIN E. CHAPIN, D.D.S.

No. 7810SC109

(Filed 6 February 1979)

1. Physicians, Surgeons, and Allied Professions § 17.4— removal of impacted wisdom tooth—incision on wrong side of mouth—sufficiency of evidence of negligence

In an action to recover damages sustained by plaintiff when defendant allegedly negligently removed her impacted wisdom tooth, evidence was sufficient to be submitted to the jury where it tended to show that defendant possessed the degree of professional learning, skill and ability which others similarly situated ordinarily possessed; plaintiff was referred to defendant for diagnosis and removal of the tooth if necessary; defendant misread an x-ray and undertook to remove the tooth in question from the wrong side of plaintiff's mouth; and in so doing, defendant damaged nerves when he inserted a needle in plaintiff's gum and anesthetized the wrong side of her mouth.

2. Evidence § 49— expert opinion—hypothetical question improper—sufficient facts in evidence to support opinion

In an action to recover damages for the allegedly negligent removal of an impacted wisdom tooth, defendant was not prejudiced by the admission of an opinion of an expert witness, though the technical requirements of hypothetical questions were not complied with, since the witness based his opinion on sufficient facts in evidence that any technical error was harmless to defendant.

3. Trial § 39— court's remarks to jury—no coercion of verdict

The trial judge did not err in coercing the jury to reach a verdict or in failing to declare a mistrial *ex mero motu* where the jury requested further instructions on negligence which were given orally but not in writing; the jury requested that testimony of three witnesses be read back to them but the request was denied because it would consume so much time; the jury then asked three questions pertaining to the witnesses' testimony but the court refused to answer them because it would take the testimony out of context and cause a misinterpretation on the part of the jury; the court encouraged the jury to resolve their differences "without doing damage or injury to your own scruples"; and the judge was very careful and considerate of the jury during the course of the trial.

APPEAL by defendant from *Herring, Judge*. Judgment entered 26 August 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1978.

Plaintiffs instituted this action against defendant, Dr. Marvin E. Chapin, D.D.S., alleging that he was negligent in removing an impacted wisdom tooth of the plaintiff, Sara Cozart, and his alleged negligent dental treatment proximately caused paresthesia or

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an altered sensation in her lower lip. Prior to trial, plaintiff's claims for damages based upon assault and battery as well as her claim for punitive damages were dismissed. T. Maurice Cozart's claim of lost consortium was also dismissed.

At trial, plaintiff presented evidence tending to show that in early 1975, she was examined by Dr. Hal P. Cockerham, who discovered an impacted wisdom tooth and referred her to defendant.

On 15 April 1975, plaintiff went to the office of defendant and was placed in defendant's chair. Defendant introduced himself and picked up a needle and injected the left side of plaintiff's mouth without discussion of the risk involved with the extraction of an impacted wisdom tooth. When the needle went in, plaintiff felt a shock and jumped at the time of injection. After plaintiff thought the surgery was completed, she said, "'Did you get the tooth' and he said, 'No,' he had read the x-ray backwards and that there was no tooth there.'" Defendant then anesthetized the right side of plaintiff's mouth and removed the impacted wisdom tooth.

Plaintiff states, "On the afternoon of the day of the surgery I felt very badly. I stayed in bed." Plaintiff experienced swelling on both sides of her face, her face looking as though she had mumps, with the left side being very swollen and the right side slightly swollen. The left side had a bruise extending down her throat which was blue and purple, and a week or so later, turned reddish or yellow. About two to four weeks after surgery, after the bruise and soreness went away, plaintiff was able to start eating, and she realized the tingling sensation was not going away in her lip.

Dr. Cockerham testified that he could not state with any degree of certainty whether he told plaintiff the location of the one remaining wisdom tooth. In his normal practice, he would have placed the x-rays in the view box, oriented the impacted wisdom tooth on the right side, and explained that the x-rays were placed in the view box so that the left side of the patient's x-ray would be sitting on the right side of the view box. It was the duty of a dentist to orient an x-ray properly with a patient's mouth if a dentist was going to use it. Dr. Cockerham forwarded an x-ray, plaintiff's Exhibit #2, to defendant. Dr. Cockerham also testified that excluding one additional filling since 15 April 1975,

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there were three teeth on one side of plaintiff's mouth, which would be a way to orient the x-ray. Dr. Cockerham's records indicated that during an office visit of 7 October 1975, plaintiff reported residual numbness in the lower left portion of her lip, and he referred her to Dr. Coffey for consultation.

Dr. Coffey, an oral surgeon, testified that he conducted certain tests on the plaintiff, and based on his examination, he was of the opinion that plaintiff had a paresthesia of the left inferior alveolar nerve. In his opinion, the standard of care of an oral surgeon in the community with similar training and experience as of 15 April 1975 was that an oral surgeon would probably have informed the patient of possible nerve damage resulting from the removal of the wisdom tooth shown on plaintiff's Exhibit #2.

Further, in Dr. Coffey's opinion, an oral surgeon complying with the standard of care would orient the x-ray with the patient or the patient with the x-ray.

Dr. Gordon Burch, an expert in neurology, testified that he made two examinations of plaintiff in February 1976 and April or May 1977, and on the basis of his examination, he concluded that plaintiff was suffering from a sensory change consistent with abnormal function in the inferior alveolar nerve on the left side, in that, the nerve was conducting electrical impulses abnormally. Furthermore, Dr. Burch felt that in his opinion, it was highly unlikely that plaintiff's condition would change. Dr. Burch also testified, over objection, that it was his belief that the inferior alveolar nerve had been injured at the time of the local anesthetic undertaken on the left side.

Defendant testified that his appointment book for 11:00 a.m. on 15 April 1975 showed "Sara Cozart, horizontal number 17 . . . panorex sent, her telephone number and Dr. Cockerham." Defendant did not know the source of this information. Number 17 designated a lower left third molar. He said something to the effect, "[W]ell, you have only one left on the left," and plaintiff nodded to the statement. Defendant did not recall whether plaintiff jumped when he injected her on the left side. When defendant discovered no tooth on the left side, he sutured the incision and repeated the procedure on the right side.

Dr. Nicholas Georgiade testified that he examined plaintiff on 8 August 1977 and that in his opinion, plaintiff had a subjective

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dysesthesia consistent with the branches of the nerves of the jawbone. He felt that the plaintiff's delayed perception of the altered sensation was incompatible with the existence of neuroma and that, in his opinion, the incision made by defendant on the left side of plaintiff's mouth could not have damaged the inferior alveolar nerve on that side.

Dr. John Angelillo corroborated the opinion of Dr. Georgiade to the effect that the delay in the onset of the dysesthesia is not compatible with nerve injury at the time of plaintiff's injection. Dr. Angelillo stated that the incision by defendant on the left side of plaintiff's mouth could not have damaged the inferior alveolar nerve since, in his opinion, nerve damage produces an immediate altered sensation.

After the jury had retired, it had difficulty in reaching a verdict, and at one point requested permission to rehear the testimony of Drs. Burch, Georgiade, and Angelillo. The jury formulated written questions and presented them to the trial judge who determined the questions could not be answered without a resulting misinterpretation by the jury. The jury reached a verdict in favor of plaintiff in the amount of \$37,250.00. Defendant appeals.

Crisp, Bolch, Smith & Davis, by Joyce L. Davis and Robert B. Schwentker, for plaintiff appellee.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., for defendant appellant.

ERWIN, Judge.

Defendant contends that the trial court erred in denying his motion for a directed verdict at the close of all of the evidence on the grounds: (1) that plaintiff's evidence was insufficient to establish actionable negligence by defendant and (2) that plaintiff's evidence was insufficient to establish that defendant's failure to orient the x-ray with plaintiff's mouth was the proximate cause of plaintiff's injury.

Our Supreme Court held in *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E. 2d 762, 765 (1955):

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"A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. *Long v. Austin*, 153 N.C. 508, 69 S.E. 500; *Nash v. Royster*, 189 N.C. 408, 127 S.E. 356; *Smith v. McClung*, 201 N.C. 648, 161 S.E. 91; *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102; *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57. If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

The rules of liability applicable to physicians and surgeons apply likewise to dentists. *Hazelwood v. Adams*, 245 N.C. 398, 95 S.E. 2d 917 (1957); *Grier v. Phillips*, 230 N.C. 672, 55 S.E. 2d 485 (1949); *McCracken v. Smathers*, 122 N.C. 799, 29 S.E. 354 (1898).

On motion for judgment as of nonsuit, plaintiff's evidence is to be taken as true. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968); *Edwards v. Johnson*, 269 N.C. 30, 152 S.E. 2d 122 (1967); *Harris v. Wright*, 268 N.C. 654, 151 S.E. 2d 563 (1966). All the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deducted from the evidence. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969). Defendant's evidence may be considered to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or explain plaintiff's evidence. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783 (1968); *Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967); 12 Strong's N.C. Index 3d, Trial, § 21.1, pp. 399-400.

Plaintiff alleged defendant's negligence as follows:

"[H]e failed to exercise the degree of professional learning, skill and ability which others similarly situated possess; or to exercise the reasonable care and diligence in the application of his knowledge and skill to the plaintiff Sara Cozart's care;

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or to use his best judgment in the treatment and care of his patient Sara Cozart at the time in question.

15. Defendant was also negligent in that he failed to make a proper and necessary examination to diagnose the condition of plaintiff's tooth and jaw before extracting said tooth.

16. Defendant was also negligent in that he failed to make a proper and necessary examination of the plaintiff's tooth, particularly by his own x-rays, before such extraction.

17. Defendant was also negligent in that he obviously mis-read the x-ray that he was given of plaintiff's mouth, if indeed he read it at all.

18. Defendant was negligent in that he carelessly and negligently injected the needle to anesthetize the lower left side of plaintiff Sara Cozart's mouth, and said injection injured the neurovascular bundle (the secondary or tertiary branch of the V3 distribution) in the area of the mandibular third left molar, when in fact the tooth to be extracted was located in the right side of her mouth and there was no reason for an injection to be made on the left side of the mouth; OR IN THE ALTERNATIVE, the defendant was negligent in that while patient Sara Cozart had the right to an informed election as to whether to undergo the proposed elective surgery, defendant did not inform her of the likelihood of the adverse results and defendant had knowledge of the risk involved and the plaintiff Sara Cozart was unaware of such risks.

19. In addition to the negligence of making an unnecessary injection, defendant was careless and negligent in that said injection, to anesthetize the lower left side of the plaintiff Sara Cozart's mouth, struck and injured the neurovascular bundle in the area of the mandibular on the lower left side of plaintiff Sara Cozart's mouth; OR IN THE ALTERNATIVE, the defendant was negligent in that while patient Sara Cozart had the right to an informed election as to whether to undergo the proposed elective surgery, defendant did not inform her of the likelihood of the adverse results and the plaintiff Sara Cozart was unaware of such risks.

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20. Defendant was negligent in that he made an incision and conducted surgery on the side of plaintiff Sara Cozart's mouth with the intention of extracting a wisdom tooth on a side of the mouth where there was no wisdom tooth."

Plaintiff and defendant stipulated:

"In early January, 1975, Dr. Hal P. Cockerham referred plaintiff to defendant for diagnosis and, if necessary, removal of an impacted wisdom tooth."

Plaintiff testified:

"[T]hen Dr. Chapin came in the room shortly after and he introduced himself, and I introduced myself. He picked up the needle and put the injection into the left side. I had a shock that shocked me and I heard Dr. Chapin say that I've hit the pocket, or some such thing as that, and that's good. I just relaxed thinking no problem and sat back and Dr. Chapin left the room. Dr. Chapin left the room while the Novacaine was taking effect and his nurse and I had small talk.

... I was sitting in a chair. This was the type chair that had the two headpieces that your head sits back on. Over to my left was the nurse with the tools and behind me was the x-ray. Dr. Chapin looked behind me to look at that x-ray. I did not see the x-ray. Then he picked up the knife and I closed my eyes and he began to do his surgery. I thought the surgery was completed and I opened my eyes. I said, 'Did you get the tooth' and he said, 'No,' he had read the x-ray backwards and that there was no tooth there. He finished sewing and he immediately picked up another needle and put an injection in the right side, which I did not feel any type of shock or any reaction with. He then left the room and I heard him say in the hall it was the first time he had ever done that. ... He did cut the tooth out, several pieces. I had not remembered it taking that long on having a wisdom tooth removed."

Plaintiff's medical evidence tended to show that defendant's standard of medical practice would require him to orient himself with plaintiff and the x-ray of her mouth, which was available to him at the time plaintiff was present in his office. All of the

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evidence showed the impacted wisdom tooth was in the right lower gum of plaintiff rather than the left lower gum.

There is no question that the defendant possessed the degree of professional learning, skill, and ability which others similarly situated ordinarily possessed. The record clearly shows that plaintiff was referred to defendant by Dr. Cockerham "for diagnosis and, if necessary, removal of an impacted wisdom tooth." To us, this required defendant to examine the area of the impacted tooth and the x-ray to determine if the tooth should be removed.

[1] The evidence was sufficient to take this case to the jury on the issue of whether defendant exercised reasonable care and diligence in the application of his knowledge and skills to plaintiff's case and gave her such attention as he was required to give. *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973); *Belk v. Schweizer*, 268 N.C. 50, 149 S.E. 2d 565 (1966). Defendant's contention that he relied upon the information in his appointment book that number 17—the lower wisdom tooth was to be removed is in conflict with the requirements of the stipulated evidence, which he cannot escape.

To be actionable, it is not necessary that injury in the precise form in which it occurs should be foreseen from an act of negligence. It is only necessary that in the exercise of reasonable care, consequences of a generally injurious nature might be expected. *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E. 2d 683 (1965); *Childs v. Dowdy*, 14 N.C. App. 535, 188 S.E. 2d 638 (1972); 9 Strong's N.C. Index 3d, Negligence, § 9, pp. 364-65.

We conclude that plaintiff met her burden on the issue of proximate cause to submit the issue to the jury on the record before us. Defendant's motion for judgment as of nonsuit was properly overruled.

[2] On direct examination of Dr. Burch (witness for plaintiff), the record reveals:

"Q. How did you come to your conclusion that the condition you found in Sara could have been caused by a neuroma?"

MR. BLOUNT: Objection.

NO RULING WAS MADE BY THE COURT, BUT THE WITNESS ANSWERED:

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EXCEPTION NO. 21

A. I came to that conclusion because one, of the history that I had after surgical procedure and local anesthetic having been undertaken, and two, that the patient had a complaint consistent with injury to the inferior alveolar nerve and findings on my examination also consistent with injury to that nerve. In the effort of applying local anesthetic, it was clearly Dr. Chapin's intent to anesthetize the distribution of the inferior alveolar nerve and the needle was therefore introduced in the immediate vicinity.

MR. BLOUNT: Your Honor, I move to strike. He doesn't know what Dr. Chapin's intent was.

COURT: The objection is sustained and the motion to strike is allowed. The jury is instructed to disregard that testimony.

A. I had the history that the patient had received a local anesthetic for procedure in the left side. Knowing the course of the inferior alveolar nerve and knowing by the patient's report she had experienced a sudden shock-like sensation, to which indicated to me that the nerve had been injured at the time of the anesthetic, or at least touched by the needle if not frankly injured, and that it was therefore a reasonable conclusion that the patient's complaint and the findings that I had elicited on examination were related to injury to the inferior alveolar nerve, which had given rise to the formation of a neuroma.

MR. BLOUNT: Move to strike the answer.

COURT: Denied.

EXCEPTION NO. 22."

Defendant contends the trial court erred in allowing Dr. Burch's answer into the record over his motion to strike. We do not agree.

Defendant relies on the cases of *Summerlin v. R.R.*, 133 N.C. 550, 45 S.E. 898 (1903), and *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967), which held that the opinion of an expert must be based upon facts within the personal knowledge of the expert or

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upon facts, supported by evidence, stated in a proper hypothetical question.

Plaintiff concedes that maybe the technical requirements of hypothetical questions were not complied with here. Dr. Burch based his opinion on sufficient facts in evidence that any technical error was harmless to defendant. Dr. Burch testified prior to the complained-of question:

"I have had occasion to meet Sara Cozart. She presented herself to my clinic for examination on February 13, 1976. The clinic was in the Medical Private Diagnostic Clinic of Duke University. She presented herself to me with a complaint which was neurological in nature. The complaint specifically was that of numbness over the lower left lip and left chin. She indicated to me that—in reviewing the history I was aware of all of the events that had transpired relative to her initial consultation with Dr. Cockerham and his referral of Mrs. Cozart to Dr. Chapin for oral surgery and the complaint that she dated to the time of that surgery. . . .

I took a medical history of Sara at that time. I obtained the history that Mrs. Cozart had presented herself to Dr. Cockerham for dental care and he determined she was suffering from an impacted tooth and had therefore referred her to Dr. Chapin. She had undergone consultation with Dr. Chapin in April of 1975. Mrs. Cozart related to me that she had undergone local anesthesia and surgical incision on the left side of her lower mouth and that this had in fact been undertaken mistakenly; that Dr. Chapin had sutured the incision area and explained to her that it had been a mistaken surgical approach, and subsequently undertook the extraction of the tooth in question on the right side and did so successfully. She indicated to me that at the time when the injection of anesthesia was administered on the left side she experienced a sudden shock-like sensation in the region of the chin on the left and that this passed quickly however. And at the time she noted nothing further in the region in question.

She stated that the extraction of the tooth on the right side had been rather difficult and painful, and that she was instructed by Dr. Chapin appropriately in the use of ice-packs

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and Codeine for the relief of her pain. At approximately 9:00 p.m. on the day of the procedure she began to experience nausea and vomiting and contacted Dr. Chapin who advised her to discontinue the Codeine, believing it was the offending agent causing the nausea and vomiting. She related to me that she had a considerable amount of swelling and bruising in the jaw on both sides following the procedures, and indeed that it was her observation that the swelling and pain following the procedures was actually somewhat worse on the left side where no tooth had been retrieved, where certainly she was experiencing a great deal of discomfort on the surgical side as well.

* * *

I had at my disposal a report from Dr. Coffey and also some brief notes from Dr. Chapin."

The report of Dr. Coffey, plaintiff's Exhibit No. 3, was admitted into evidence at the trial and reads as follows:

"Dear Dr. Cockerham:

Thank you for referring Mrs. Cozart to us for treatment. As I notified you by phone she was seen in our office on October 14th by Dr. Bell and me for evaluation and x-ray examination of paresthesia of the left lower lip.

Our findings revealed a normal response to pain stimulus in both the right and left lower lips, however, a paresthesia was present in the left lower lip which gave an altered response to touch stimulus. The sensation in the gingiva on both the right and left sides was essentially the same, however, the teeth on the lower left side gave no response when tested with ice where as the ones on the right side gave approximately a five second response. X-ray examination of #17 area did not show evidence of bony surgery in the area immediately adjacent to the neuro vascular bundle and we could find no evidence of disruption of the cortical bone surrounding the neuro vascular bundle in #17 area. It was our impression that the nerve involvement on the lower left side was possibly secondary to contact between the needle and the neuro vascular bundle at the time of injection on that side since the patient stated that she did experience what

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she described as a shock in her lower left lip and teeth at the time of injection. Injury, nevertheless, to the nerve by the actual surgery cannot definitely be ruled out as a causative factor in the current findings.

I have told her that the condition would probably improve over the next two months but in all probability at the end of twelve months healing would be essentially complete. I advised her that in my past experience when paresthesia did occur that the return in sensation to the lip on the affected side was never the same feeling on the other side. Mrs. Cozart was very pleasant throughout the consultation and I would not expect any future problems to arise with this case.

If I can be of any further help, please feel free to give me a call. We told Mrs. Cozart that if she would like to see us again in the future for further consultation that we would be glad to help her.

Sincerely,

DRS. BELL, MARTIN AND COFFEY, P.A.

/s/

R. DONALD COFFEY, JR., D.D.S."

Our Supreme Court stated in *Penland v. Coal Co.*, 246 N.C. 26, 31, 97 S.E. 2d 432, 436 (1957):

"As to this contention, the rule is that ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made, as in the instant case, in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. 'In such cases statements of an injured or diseased person, while not admissible as evidence of the facts stated, may be testified to by the physician to show the basis of his opinion.'" (Citations omitted.)

In *State v. DeGregory*, 285 N.C. 122, 134, 203 S.E. 2d 794, 802 (1974), Justice Huskins reviewed the problem of opinions by expert witnesses and concluded:

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"On these authorities, and on reason as well, we hold it was proper for Dr. Rollins to base his expert opinion as to the sanity of Karl DeGregory upon both his own personal examination and other information contained in the patient's official hospital record. The question was proper and the answer was competent."

With the wealth of information available to Dr. Burch as revealed by the record before us, we conclude that the trial court's ruling on the evidence in question was proper, and this assignment of error is overruled.

Defendant argues that the trial court erred in allowing Dr. Coffey to testify about the risk involved in extracting plaintiff's impacted wisdom tooth on the lower right side of her mouth, since this did not relate to the issues raised by plaintiff's claim which involved negligence on the basis of the injection and operation on the left side of plaintiff's mouth. At the close of all of the evidence, the trial court ruled:

"However, I wish to make it clear that I do not see the application of informed consent, or any theory with respect to informed consent to the evidence. And I intend to submit the issue to the jury with respect to alleged negligence, as the same would deal with the use of x-rays and then going in on the left side and instead of the right side."

In view of the court's ruling, we find no merit in this contention of defendant.

[3] In his last assignment of error, defendant contends that the trial judge erred in coercing the jury to reach a verdict and failing to declare a mistrial *ex mero motu*. Defendant did not move for a mistrial nor did defendant object to any of the conduct of the court he now complains of.

The jury started its deliberations at 4:55 p.m. on Thursday and did not reach an agreement. On Friday morning, the jury requested the court to define negligence and how the law applies in this case. This was done by the court, after which, the jury requested such instruction in writing. This request was denied. The jury resumed deliberations. At 2:00 p.m., the court instructed the jury as follows:

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"Well, thank you, sir. I would say to the jury then, that I know that there are occasions where reasonable men and women simply cannot agree. At this point, however, the law requires me to instruct you that it is your duty, if you can do so, to resolve any differences between yourselves as reasonable men and women, *and without doing damage or injury to your own scruples*, to reach a verdict in this matter, if it is possible for you to do so.

(It will be very expensive for both parties in this matter to retry this case. If you are not able to reach a verdict in the matter, then I will have no choice but to declare a mistrial and to order a retrial of the matter before another jury at another session of court. The matter is important to both the plaintiff and the defendant, and as I said, the retrial will be an expensive matter. So, I'm going to ask you please to go back to the jury room again and reconsider the matter, consider it further and see if you can reach a verdict in the matter. You have been out for some period of time now that is approaching one complete day, but I would like for you to consider the matter further, if you will. If you have not reached a verdict by five o'clock this afternoon, when we would normally recess for the day, I intend to bring you back at that point and we'll decide where to go from there, but you may retire now and resume your deliberations.)

EXCEPTION No. 30" [Emphasis added.]

The jury returned to its room for the remainder of the day.

As court convened on Friday morning, the jury requested testimony of Drs. Burch, Georgiade, and Angelillo. The court advised the jury as follows:

"(Ladies and gentlemen of the jury and Mr. Foreman, I conferred yesterday afternoon with the court reporter who took a portion of the testimony that you've asked be read back, and my conclusion is that it is totally impractical, because of the length of the testimony and what she would have to do with her notes in order to read that back to you, and it would probably take some considerable period of time more to read it back than the actual time expended in receiving the testimony; therefore, I must deny the request that testimony be read back.

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It is still your duty, of course, under the law, to remember and consider what the testimony was; and while I recognize the impractical aspect of that and the unrealistic aspect of that, it's your duty as jurors to confer together and, as best you can, determine what the testimony was. You have the final say in the matter as to what the findings of fact are in the case, in any event.

Is it possible that you might narrow the matter down to a specific question or questions? If you can, I will confer with counsel and see if, from notes available, we might possibly reach an agreement as to what the testimony was with respect to a particular subject. Would you like to confer among yourselves further on that point?)

EXCEPTION NO. 33

...

COURT: Very well. I'll ask the bailiff to again hand you the issue, if he has not done so already, and you may retire to the jury room to confer again. If you feel that you are able to reduce the matter to any questions, I'll be happy to take up the questions with counsel and see if any kind of answer can be provided, if they will consent to do so, in any event. Thank you very much.

...

COURT: Addressing myself now, in the absence of the jury, to counsel for both the plaintiff and the defendant, I have done, I think, what was suggested and agreed to yesterday in Chambers, and we shall see if there is a question of any kind that might help resolve this matter."

At 10:00 a.m., the jury returned with three written questions for the court:

"(The questions are, first: With respect to the testimony of Dr. Burch, he gave possible causes for this particular nerve damage. What were they? Dr. *Georgeola* [sic], did he give possible causes; if so, what? After his examination, he eliminated some of these causes. What were they? Dr. Angelillo, the results of his examination showed through x-rays that some of the possible causes could not be found. What were they?

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All right. As I told you, I will confer with counsel in chambers to see if we can come up with anything, and we will reconvene as soon as that is done. In any event, let us recess for twenty minutes at this point so that we might confer on the matter. Court is recessed for twenty minutes.)

EXCEPTION NO. 34

...

COURT: (Mr. Foreman and ladies and gentlemen of the jury, I have conferred with counsel both for the plaintiff and defendant, and a great effort has been made to answer the questions that have been put; however, we have all three concluded that we are unable to come up with an accurate answer and all feel that to answer the questions—if we were able to—from our notes would take that part of it out of context and thus cause a misinterpretation on your part, so I am sorry. We are simply unable to answer the questions as they have been stated. So I'm going to have to ask you to again retire and do the best you can and exercise your best ability to recall what was said by the witnesses who have testified.)

EXCEPTION NO. 35"

After lunch at 2:25 p.m., the jury returned its verdict in open court, was polled at the request of defendant, and the jury assented to its verdict.

Defendant contends the cumulative effect of the course of the trial as set out was highly improper and coercive; therefore, defendant should have a new trial. Defendant relies on *Pirch v. Firestone Tire & Rubber Co.*, 80 N.M. 323, 455 P. 2d 189, 38 A.L.R. 3d 1273 (1969), which held that: (1) the trial court erred by imposing a time limit upon the deliberations of a jury tending to coerce jurors into agreeing upon a verdict contrary to their individual convictions, in order that a verdict may be reached within the time limit; and (2) the cumulative effect of actions taken by the trial judge as to a deadlocked jury in a products liability case, such actions, including remarks relating to the length of time the case has taken, the expense involved, and the importance of the case, and the imposing of a time limit for further deliberations, was coercive and tended to force agreement, and thus constituted reversible error.

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The plaintiff states:

"Similar instructions have been upheld in many cases including *STATE v WILLIAMS*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *STATE v BAILEY*, 280 N.C. 264, 185 S.E. 2d 683 (1971) [sic] [, *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972)]; *STATE v MCVAY* and *STATE v SIMMONS*, 279 N.C. 428, 183 S.E. 2d 652 (1971); *KANOY v HINSHAW*, 273 N.C. 418, 160 S.E. 2d 296 (1968); *IN RE WILL OF HALL*, 252 N.C. 70, 113 S.E. 2d 1 (1960); and *STATE v BRODIE*, 190 N.C. 554, 130 S.E. 205 (1925)."

We agree with plaintiff that similar instructions to the jury as given here have been approved by our Supreme Court. We note the trial judge was very careful and considerate of the jury during the course of the trial. We do not feel that the trial court in any way coerced a verdict or that the jury was intimidated by his actions or words.

We find no merit in defendant's final assignment of error.

In the trial below, we find

No error.

Chief Judge MORRIS and Judge ARNOLD concur.

JOHN ALEXANDER GOODEN, CORNELIUS BUTLER, JR., DOING BUSINESS AS C. BUTLER, JR., LUMBER COMPANY, WILLIAM G. McDANIEL, DOING BUSINESS AS SHANNON WOOD PRODUCTS, LYNWOOD N. BULLOCK, DOING BUSINESS AS LYN'S COACH WORKS, M. M. GILLILAND, DOING BUSINESS AS GILLILAND LOGGING COMPANY, AND WARD LUMBER COMPANY, A CORPORATION, INDIVIDUALLY AND UPON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA

No. 7810SC368

(Filed 6 February 1979)

1. Searches and Seizures § 15— standing to enjoin OSHA searches

Only the plaintiff who had been cited and fined for refusal to permit an inspection of work areas pursuant to G.S. 95-136(a) without a search warrant had

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standing to enjoin inspection pursuant to that statute, since the rights of the remaining plaintiffs have not been impinged or immediately threatened by the statute.

2. Searches and Seizures § 1; Constitutional Law § 21— warrantless OSHA searches—unconstitutionality of statute

The "Inspections" section of the Occupational Safety and Health Act of North Carolina, G.S. 95-136(a), violates the Fourth and Fourteenth Amendments to the United States Constitution insofar as it purports to authorize warrantless searches of business premises.

3. Searches and Seizures § 22— administrative inspection warrant—program of inspection test—constitutionality of statute

The provision of G.S. 15-27.2(c)(1) permitting the issuance of an administrative inspection warrant upon a showing to the magistrate that the property is to be inspected "as a part of a legally authorized program of inspection which naturally includes that property" is constitutional when the statute is interpreted as also requiring a showing that the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards" and is being applied on a neutral basis as to the particular establishment to be inspected.

4. Searches and Seizures § 22— administrative inspection warrant—insufficiency of affidavits

An affidavit did not make a sufficient showing of probable cause required for the issuance of an administrative inspection warrant where it failed to set forth facts from which the magistrate could make an independent determination that (1) there existed a legally authorized program of inspection which naturally included the property to be inspected, (2) the general administrative plan for enforcement was based upon reasonable legislative or administrative standards, and (3) the administrative standards were being applied to plaintiff on a neutral basis.

APPEAL by plaintiffs from *Donald Smith, Judge*. Judgment entered 14 December 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 15 November 1978.

Plaintiffs filed this action as representatives of a purported class composed of all persons within the State engaged in businesses dealing with wood products. They allege that defendant Commissioner of Labor intends to inspect the non-public portions of their places of business without a search warrant pursuant to the Occupational Safety & Health Act (OSHA) of North Carolina, violating the North Carolina and United States Constitutions. They further allege that plaintiff Ward Lumber Company (Ward) has been cited and fined for refusal to permit such inspection. Plaintiffs seek to have defendant enjoined from

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conducting such inspections and from citing and fining those who refuse the inspections. They also ask to have such inspections declared unconstitutional. Two attachments to the complaint, apparently communications from the North Carolina Forestry Association to its members, indicate that OSHA planned to make the wood products industry the subject of its State Emphasis Program for 1977 and 1978 because of the industry's high injury and illness rate and large number of employees.

Plaintiffs filed a motion for a preliminary injunction, attaching to it copies of the OSHA citations of Ward Lumber Company on 19 July 1977 and Ward's letter to OSHA contesting the citations. In response to an order to show cause, Lawrence Weaver, the acting director of OSHA, filed an affidavit setting out the selection criteria of the State Emphasis Program and indicating why the wood products industry met these criteria. The affidavit also stated that on 9 May 1977 an inspection was attempted at Ward Lumber Company, but the OSHA officer was refused entry. An Administrative Inspection Warrant was then obtained from a magistrate, but Ward refused to honor the warrant and permit the inspection. Weaver's affidavit said that it is the policy of the Department of Labor always to obtain such a warrant when entry for an inspection is refused. Both parties presented testimony at the hearing on the motion, and the motion was denied.

Defendant filed an answer asserting, among other defenses, that the complaint failed to state a claim upon which relief could be granted, and that he was entitled to summary judgment. The court found that the complaint failed to state a claim, and in the alternative that defendant was entitled to summary judgment. Plaintiffs appeal.

Hugh J. Beard, Jr., for plaintiff appellants.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

ARNOLD, Judge.

[1] Defendant first argues that plaintiffs lack standing to bring this action, since the relief they seek is merely prospective. A party has no standing to enjoin the enforcement of a statute

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unless he can show that his rights have been impinged or are immediately threatened by the statute. 7 Strong's N.C. Index 3d, Injunctions § 5.1. It is apparent here that with the exception of Ward Lumber Company no plaintiff's rights have been impinged upon by the statute, and we find that the other plaintiffs' rights are not "immediately threatened." The only indication that there may be plans to enforce the statute against them is the existence of the State Emphasis Program. Except with regard to plaintiff Ward Lumber Company the action was appropriately dismissed.

[2] We consider the merits of this appeal as it concerns Ward Lumber Company, which has already been cited and fined for refusing to allow inspections without a warrant and with an administrative inspection warrant. Plaintiff contends that its complaint did state a claim for relief, on the ground that two North Carolina statutes are unconstitutional. The first of these, G.S. 95-136(a), is the "Inspections" section of the Occupational Safety and Health Act of North Carolina, N.C. G.S. Ch. 95, Art. 16. It allows inspections of work areas without search warrants, as follows:

(a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and

(2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

This provision is essentially identical to Sec. 8(a) of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which the United States Supreme Court found unconstitutional in *Marshall v. Barlow's, Inc.*, 56 L.Ed. 2d 305 (1978).

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Barlow had denied entrance to the inspector who had no search warrant, and the court said: "We hold that Barlow was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent." *Id.* at 319. The State shows us no convincing reason, and we find none, why we should reach a different result in this case. Our "warrantless inspection" statute is essentially identical to the federal one which has been declared unconstitutional as violative of the Fourth Amendment. We find that G.S. 95-136(a) violates the Fourth and Fourteenth Amendments to the United States Constitution to the extent it authorizes warrantless searches, and that plaintiff is entitled to have the enforcement of the statute enjoined to that extent.

[3] Plaintiff also asserts that G.S. 15-27.2(c)(1) is a violation of the United States and North Carolina Constitutions. The statute, providing for the issuance of administrative inspection warrants by a magistrate or clerk of court, reads as follows:

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

(1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property.

As plaintiff points out, this statute creates two alternative criteria for determining whether to issue a warrant. The first, the "program of inspection test," is that the property is to be inspected "as part of a legally authorized program of inspection which naturally includes that property." The second is a probable cause test. If an inspection meets either of these tests a warrant is properly issued under the statute. Plaintiff argues that the program of inspection test does not satisfy the *Barlow's* requirement of probable cause.

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The court in *Barlow's* established that the meaning of probable cause is not the same in an inspection warrant procedure as it is in the case of a search warrant in a criminal proceeding.

Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' . . . A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights. 56 L.Ed. 2d at 316.

We find the requirement of G.S. 15-27.2(c)(1) that the property is to be inspected "as part of a legally authorized program of inspection which naturally includes that property" comports with the *Barlow's* criterion that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources." In light of the Supreme Court's decisions in *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967), and *Marshall v. Barlow's, Inc.*, *supra*, we interpret the statute as also requiring a showing to the magistrate that the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards." Interpreted in this way, G.S. 15-27.2(c)(1) requires a sufficient showing of probable cause, and is constitutional.

[4] We hold, in the interest of justice, that by arguing the constitutionality of G.S. 15-27.2(c)(1) the appellant has also presented for our review the sufficiency of the affidavit on which the administrative warrant was obtained. We find that the affidavit does not make a sufficient showing of the administrative probable cause which the statute requires.

Gregory S. Coulson, Director of the Enforcement Division of the North Carolina Department of Labor, in charge of OSHA inspections throughout the state, testified that "[t]he warrant secured against Ward Lumber Company is based on [our] model

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affidavit . . . [which] does not describe any reason why that specific property would have violations of the acts within its premises." He described the model affidavit as stating that

'Blank' being the name and title of the officer, being duly sworn and examined under oath, says under oath that there is a program of inspection authorized by G.S. 95-129(3), G.S. 95-133(b)(2), and G.S. 95-136(a), which naturally includes the property owned or possessed by 'Blank', this is the owner or possessor, and described as follows: 'Blank' which precisely describes the name, location and address of the property to be inspected with this warrant.

No facts from which the issuing officer could determine whether probable cause existed were included; accordingly, this affidavit is insufficient to support the issuance of an administrative search warrant. Apparently similar affidavits were implicitly disapproved by the court in *Barlow's* at note 20, and specifically disapproved by the Seventh Circuit in a recent decision relying on *Barlow's. Weyerhaeuser Co. v. Marshall*, 452 F. Supp. 1375 (E.D. Wis. 1978).

The inclusion of the underlying facts in the affidavit is necessary to make the warrant procedure meaningful. In explaining the protections afforded by a warrant, the Supreme Court in *Barlow's* said: "The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search. A warrant, by contrast, [provides] assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." 56 L.Ed. 2d at 317-18. These protections do not exist unless it is the *issuing officer* who makes the determination of whether the inspection is part of a "legally authorized program" based on a "general administrative plan derived from neutral sources" that meets "reasonable standards."

This conclusion is in accord with the position of our Supreme Court in *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). Although *Campbell* was a criminal case, we hold that the requirements for warrant procedures set out there apply equally to the issuance of administrative inspection warrants, since the pur-

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pose of a warrant in either case is to provide for a determination of probable cause by a neutral officer.

Probable cause cannot be shown "by affidavits which are purely conclusory, stating only the affiant's . . . belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp" *U.S. v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The issuing officer "must judge for himself the persuasiveness of the facts relied on by [an affiant] to show probable cause. He should not accept without question the complainant's mere conclusion. . . ." *Giordenello v. U.S.*, 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245 (1958).

Id. at 130-31, 191 S.E. 2d at 756. See also *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976).

We note that any administrative burden resulting from our decision today will be minimal, since it appears from the record before us that the Department of Labor has already established neutral guidelines and criteria for determining the target industries of enforcement programs and that it does check potential target industries against these criteria. The affidavit of Lawrence A. Weaver III, Acting Director of the OSHA Division of the North Carolina Department of Labor, apparently tendered to the court in response to an order to show cause, states in pertinent part:

5. That in order to effect a significant decrease in the number of job related injuries and illnesses, the North Carolina Department of Labor initiated in 1976 the State Emphasis Program (*SEP*) concept.

* * * *

7. That in the industry candidate selection process used by the North Carolina Department of Labor, six selection criteria were established.

8. That the first criterion is SEVERITY AND TRACTABILITY OF THE PROBLEM such that State Emphasis candidate industries

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should represent serious problems both in terms of the number of workers affected and the perceived incidence rates of the safety and health hazards, and that the problem is susceptible to improvement through the State Emphasis Program elements of education, consulting, reporting, and inspection.

9. That the lumber and wood products industry and the furniture industry had accident and illness rates of 12.8 and 11.1 respectively with a total employment of approximately 93,000 people in 1975.

10. That the overall accident and illness rate for the private employment sector in North Carolina was 7.1 and the approximate total employment was 1,680,400 people in 1975.

11. That, due to the high accident and illness rates of lumber and wood products industry and the furniture industry involving approximately 5.6 percent of the total private sector employment of North Carolina, criterion one is met.

12. That the second criterion is an EXISTENCE OF STABLE ENFORCIBLE STANDARDS which are clear, complete and susceptible to inspection.

13. That criterion two is met as there are at least four specific areas of the Occupational Safety and Health Standards, such as 29 CFR 1910.213, 29 CFR 1910.24, 29 CFR 1910.265, and 29 CFR 1910.266, which relate to the lumber and wood products industry and the furniture industry.

14. That the third criterion is GEOGRAPHICAL DISTRIBUTION.

15. That criterion three is met as the lumber and wood products industry and furniture industry are geographically distributed throughout the State of North Carolina.

16. That the fourth criterion in [sic] POTENTIAL EMPLOYER, EMPLOYEE AND PUBLIC SUPPORT which is important, but not a controlling consideration.

17. That the fourth criterion is met as at least ten educational seminars have been held throughout the state with attendance by over 500 employers and employees of the logging industry and that the North Carolina Department of

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Labor has historically maintained good relations with and received support from the furniture industry.

18. That the fifth criterion is the existence of OSHA TECHNICAL QUALIFICATIONS through special State Emphasis Program training and a selection area in which OSHA already has qualified staff and equipment.

19. That the fifth criterion is met as the members of all sections of the North Carolina Department of Labor, OSHA Division, have received special training in the selected industries both prior to and after the beginning of the State Emphasis Program and that appropriate necessary staff support and equipment is already in existence.

20. That the sixth criterion is USEFULNESS AS A PROTOTYPE of the selected industry.

21. That by meeting the first five criteria it is expected that the first selected emphasis industry will serve as a useful prototype for future State Emphasis Programs.

22. That the average number of alleged OSHA violations expected to be observed during an inspection of a plant within the selected industry is eight.

23. That the accident and illness incidence rates for the lumber and wood products industry and furniture industry are 12.8 and 11.1 respectively.

24. That these are among the highest in the State of North Carolina.

It merely remains for an agency seeking an administrative search warrant to provide such factual information in the supporting affidavit, so that the magistrate, or clerk, may make an independent determination that the requisite probable cause exists for the general administrative plan for enforcement.

[3] We find that it is further necessary for the agency to make a showing to the magistrate, or clerk, that the general administrative plan for enforcement is being applied on a neutral basis as to the particular establishment to be inspected. *Camara v. Municipal Court, supra*; *Weyerhaeuser Co. v. Marshall, supra*. This assures that the plan will not be discriminatorily applied against a particular establishment for harassment or deception.

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[4] In the case *sub judice*, there was no showing from which a magistrate could have independently determined (1) that there existed a legally authorized program of inspection which naturally included the property, (2) that the general administrative plan for enforcement was based upon reasonable legislative or administrative standards, and (3) that the administrative standards were being applied to plaintiff on a neutral basis. Thus the warrant was improperly granted.

Having determined that the warrant procedure of G.S. 15-27.2(c)(1) was not complied with, we reverse, and as a result we find it unnecessary to reach plaintiff's contention that the statute violates Art. I, Sec. 20 of the North Carolina Constitution. *But see Brooks v. Taylor Tobacco Enterprises, Inc.*, 39 N.C. App. 529 (No. 7813SC691, 6 February 1978).

Plaintiff Ward Lumber Company was entitled to declaratory judgment that G.S. 95-136(a) is unconstitutional to the extent that it authorizes warrantless searches. Defendant was not entitled to summary judgment. In accordance with this opinion judgment of the trial court is

Reversed.

Judges HEDRICK and VAUGHN concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, PETITIONER v. TAYLOR TOBACCO ENTERPRISES, INC., AND GEORGE RONALD TAYLOR, RESPONDENTS

No. 7813SC691

(Filed 6 February 1979)

1. Constitutional Law § 21; Searches and Seizures § 1— administrative inspection warrant—no general warrant

An administrative inspection warrant issued pursuant to G.S. 15-27.2 does not constitute a general warrant prohibited by Art. I, § 20 of the N. C. Constitution.

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2. Constitutional Law § 21; Searches and Seizures § 22— administrative inspection warrant—program of inspection and probable cause standards—constitutionality

Provisions of G.S. 15-27.2(c)(1) which permit a magistrate to issue an administrative inspection warrant upon making an independent determination that the target property "is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property" or that there is "probable cause" justifying an administrative inspection of the property are not unconstitutionally void for vagueness.

3. Searches and Seizures § 22— administrative inspection warrant—affidavit—showing necessary under program of inspection standard

An affidavit for issuance of an administrative inspection warrant under the "program of inspection" standard of G.S. 15-27.2(c)(1) must contain an adequate description of the "general administrative plan," the "specific neutral criteria" used to determine which businesses will be inspected under the plan, and facts showing why the particular business sought to be inspected comes within the plan.

4. Searches and Seizures § 22— administrative inspection warrant—program of inspection standard—conclusory allegation in affidavit

A conclusory allegation in an affidavit that business property "is to be inspected as part of a legally authorized program of inspection which naturally includes that property" is insufficient to support the issuance of an administrative inspection warrant.

5. Searches and Seizures § 19— validity of warrant—consideration of affidavits—applicability to administrative inspection warrants

The rule that the sufficiency of a search warrant should properly be determined with reference to the supporting affidavits is also applicable to administrative inspection warrants.

6. Searches and Seizures § 23— OSHA inspection warrant—validity

A warrant authorizing an OSHA inspection of business premises and the supporting affidavits were sufficient to meet minimal standards under the "program of inspection" test set out in G.S. 15-27.2(c)(1) where the affidavits contained sufficient facts to enable the issuing officer to make an independent determination that the Department of Labor had developed a plan for enforcement of the Occupational Safety and Health Act which used neutral criteria in selecting particular businesses to be inspected, and facts in the affidavits indicated that the business sought to be inspected fell within this general plan because it had never been inspected, it was engaged in a high hazard industry according to a standard industrial classification code, and it involved the use of various types of machinery.

7. Searches and Seizures § 25— OSHA inspection warrant—statistics showing probability of violations—insufficiency to show probable cause

An attempt to show through statistics that an inspection of a business would be likely to reveal OSHA violations is not sufficient to meet the "probable cause" test under G.S. 15-27.2(c)(1).

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8. Searches and Seizures § 19— OSHA inspection warrant—objects of inspection shown by affidavits

Although a warrant authorizing an OSHA inspection of business premises did not itself specifically indicate the objects of the inspection, it sufficiently complied with G.S. 15-27.2(d)(3) where the supporting affidavits set out in great detail various objects and conditions that the inspection was intended to check or reveal.

APPEAL by respondents from *Herring, Judge*. Judgment entered 28 April 1978 in Superior Court, BLADEN County. Heard in the Court of Appeals on 15 November 1978.

This matter was heard upon a petition for an Order compelling respondents to appear and show cause why they should not be held in contempt for refusal to honor an Administrative Inspection Warrant issued pursuant to G.S. § 15-27.2. Respondents answered, denying validity of the warrant, and filed motions to dismiss, for judgment on the pleadings, and for summary judgment. After a hearing, respondents' motions were denied, and the Court entered an Order on 28 April 1978 making findings of fact, which, except where quoted, are summarized below:

Respondent Taylor Tobacco Enterprises, Inc., is a North Carolina corporation and is subject to the Occupational Safety and Health Act of North Carolina ("OSHA"), G.S. §§ 95-126 to -155, and is subject to administrative inspection thereunder pursuant to G.S. § 95-136. On 29 December 1977, the respondents refused to submit to a warrantless inspection of their premises by agents of the North Carolina Department of Labor. On 21 March 1978, an Administrative Inspection Warrant was issued and was properly served on the respondents at the situs of Taylor Tobacco Enterprises. Upon service of the search warrant, "Respondent George Ronald Taylor, while acting in his capacity as an officer of the Respondent Taylor Tobacco Enterprises, Inc., stated to duly authorized O.S.H.A. inspectors that he would prevent them from inspecting the premises" and that the respondents "acted willfully, deliberately, and knowingly and conducted themselves in such a manner as to lead the O.S.H.A. inspectors present to reasonably believe that force might be used if they attempted to conduct the inspection authorized by the aforementioned warrant." The court also found that the administrative inspection warrant was based on "probable cause to believe that violations of the Occupational Safety and Health Act are present at the situs of the property

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described above" and that the warrant "complied with every mandate of the United States and North Carolina Constitutions and was lawfully and properly issued.

Based on the foregoing, the trial court concluded that Respondents were "in contempt of the lawful Order of this Court" and ordered them to pay a fine of \$500 or submit to an administrative inspection within ten days of entry of judgment. Respondents appealed.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for petitioner appellee.

Paderick, Warrick & Johnson, by Dale P. Johnson, for respondent appellants.

HEDRICK, Judge.

[1] Respondents first contend that the trial court erred in denying its motion to dismiss and motion for judgment on the pleadings because "the Administrative Inspection Warrant is unconstitutional on its face."

Art. I, § 20 of the North Carolina Constitution is as follows:

General warrants, whereby an officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

Respondent argues that the "Administrative Inspection Warrant herein is the type envisioned by drafters of Article I, Section 20, and the type of warrant proscribed." We disagree.

Article I, § 20 proscribes warrants that empower officials to search for evidence of a particular offense without specifically naming the person against whom the offense is charged, the particular place to be searched or the items to be seized. "The general warrant was a recurring point of contention in the colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several Parliamentary revenue measures

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that most irritated the colonists." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 1820, 56 L.Ed. 2d 305, 310 (1978). Consequently, the constitutional proscription against unreasonable searches and seizures "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8, 97 S.Ct. 2476, 2481, 53 L.Ed. 2d 538, 546 (1977). The general warrant commanded the officers to search for persons who had committed an offense; because only the offense was named and not the offender, and since no evidence that the crime had been committed was required, this empowered the officers to search, in their discretion, any place they wished. 1 Cooley, *Constitutional Limitations*, Ch. X, at p. 612-15 (8th ed. 1927). It is this "almost unbridled discretion [of] executive and administrative officers, particularly those in the field, as to when to search and whom to search" that the warrant requirements are intended to check. *Marshall v. Barlow's, Inc.*, 436 U.S. at 323, 98 S.Ct. at 1825-26, 56 L.Ed. 2d at 317-18.

A warrant to conduct an administrative inspection issued pursuant to G.S. § 15-27.2 could in no sense be considered a general warrant. While G.S. § 15-27.2(c)(1) sets forth standards for issuance of an administrative search warrant which are less stringent than the probable cause standards required in the criminal law sense under G.S. § 15A-246, as hereinafter discussed, these standards are certainly sufficient "to guarantee that a decision to search private property is justified by a reasonable governmental interest." *Camara v. Municipal Court*, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed. 2d 930, 941 (1967). See also, *State, ex rel. Accident Prevention Div. v. Foster*, 31 Or. App. 291, 570 P. 2d 398 (1977). G.S. §§ 15-27.2(c)(2) and (3) require the applicant to provide signed affidavits and the issuing official to examine the affiant to verify the accuracy of the matters in the affidavit. Under G.S. § 15-27.2(d)(2) the warrant must accurately and specifically describe the property sought to be inspected. G.S. § 15-27.2(d)(3) requires that the warrant "indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal." Finally, G.S. § 15-27.2(f) codifies an "exclusionary rule"

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whereby any facts or evidence obtained through the use of an invalid warrant may not be considered in imposing any civil, criminal, or administrative sanctions, nor used to obtain another warrant.

From the foregoing, it is clear that the statutory scheme for obtaining a warrant to conduct an administrative inspection, when complied with, provides ample protections against the constitutional proscription of general warrants.

[2] Respondents next contend that the first clause of G.S. § 15-27.2(c)(1) is unconstitutionally "void for vagueness." G.S. § 15-27.2(c) is as follows:

The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

- (1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity, or circumstance which legally justifies such a search or inspection of that property;
- (2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;
- (3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit.

Respondents argue that the language contained in the statute, specifically "which naturally includes that property" is "unclear, general, and broad." They also argue that what is "legally authorized" under the statutory provisions "is virtually impossible for the issuing judicial officer to determine." Finally, they contend that allowing inspection of a business as "part of a legally authorized program of inspection" is inadequate to meet constitutional standards of specificity.

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We believe that respondents' argument reflects a misunderstanding of the considerations which lie at the core of the less stringent probable cause requirements for obtaining administrative inspection warrants. The North Carolina statute authorizes the judicial officer to issue an administrative search warrant after making an independent determination that one of two standards has been met. The first is that the target property "is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property." The second is that there is "probable cause" justifying an administrative inspection.

In *Camara v. Municipal Court*, *supra*, the United States Supreme Court, in explaining the requirements for obtaining a warrant to inspect private dwellings for violations of a municipal health code, held that "where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." 387 U.S. at 538, 87 S.Ct. at 1735, 18 L.Ed. 2d at 940. In *Marshall v. Barlow's, Inc.*, *supra*, the Court had occasion to explain more specifically the less stringent probable cause standard for obtaining an administrative warrant in the context of an OSHA inspection.

We think the following language from the *Barlow's* opinion is applicable in interpreting the two standards contained in G.S. § 15-27.2(c)(1):

[An OSHA agent's] entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, [387 U.S. at 538, 87 S.Ct. at 1736, 18 L.Ed. 2d at 941.] A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan

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for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

436 U.S. at 320-21, 98 S.Ct. at 1824-25, 56 L.Ed. 2d at 316.

[3] Based on the above, we are of the opinion that the "program of inspection" test under the North Carolina statute in substance uses the same criteria described in the *Camara* opinion. It requires the agent seeking the warrant to provide facts in an affidavit showing that a particular business has been selected for inspection "pursuant to an administrative plan containing specific neutral criteria." *Id.* The affidavit to support issuance of a warrant under this standard must contain an adequate description of the "general administrative plan," the "specific neutral criteria" used to determine which businesses will be inspected under the plan, and facts showing why the particular business sought to be inspected comes within the plan.

The second standard for obtaining a warrant under G.S. § 15-27.2(c)(1), the "probable cause" test, is also definable by reference to the *Camara* and *Barlow's* opinions. The Supreme Court in *Barlow's* noted that under the federal act, employees or their representatives could give written notice to the Secretary of the Department of Labor of what they believed to be violations of safety regulations and could request an inspection. *See*, 29 U.S.C. § 657(f)(1). Corresponding provisions in the North Carolina statute, G.S. § 95-130(6), (7), (8), and (9), give employees similar rights and afford them protection from discharge or discrimination if they have "filed any complaint or instituted or caused to be instituted any proceeding or inspection" under the provisions of the statute. Consequently, the "probable cause" standard permits an OSHA agent to obtain a warrant where he has "specific evidence" in an affidavit showing that "conditions in violation of OSHA exist on the premises." *Marshall v. Barlow's, Inc.*, 436 U.S. at 320, 98 S.Ct. at 1824, 56 L.Ed. 2d at 316.

Having thus determined that the statute is not unconstitutionally "void for vagueness," we next proceed to consider respondents' contention that it was "unconstitutionally applied" in the present case.

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[4] We first note that the warrant that was issued stated in part "[T]he applicant . . . being duly sworn, has stated to me that the property described in the attached affidavit is to be inspected as part of a legally authorized program of inspection which naturally includes that property." Such conclusory allegations by the affiant, which are nothing more than a perfunctory restatement of the statutory language contained in G.S. § 15-27.2(c)(1), are clearly insufficient to meet the statutory requirements. The Supreme Court in *Barlow's* rejected a similar attempt to show probable cause, stating:

The application for the inspection order . . . represented that "the desired inspection and investigation are contemplated as part of an inspection program designed to assure compliance with the Act . . ." The program was not described, however, or any facts presented that would indicate why an inspection of Barlow's establishment was within the program.

Id. at 323, n. 20, 98 S.Ct. at 1826, 56 L.Ed. 2d at 318.

[5, 6] In the present case, however, we think that the warrant authorizing the present search, although inartfully drafted, coupled with the supporting affidavits are sufficient to meet minimal standards under the "program of inspection" test set out in G.S. § 15-27.2(c)(1). We think the rule that the sufficiency of a search warrant should properly be determined with reference to the supporting affidavits, *see State v. Murphy*, 15 N.C. App. 420, 190 S.E. 2d 361 (1972), is also applicable in the context of administrative inspection warrants.

[7] The supporting affidavits contained sufficient facts to enable the issuing officer to make an independent determination that the Department of Labor had developed a plan for enforcement of the Act which used neutral criteria in selecting particular businesses to be inspected. Facts were included in the affidavits indicating why Taylor Tobacco Enterprises fell within this general plan or program of inspection. For example, some of the facts contained in the affidavit are that Taylor had never been inspected, it was engaged in a high hazard industry according to a standard industrial classification code, and it involved the use of various types of machinery. In holding that the affidavits are sufficient under the "program of inspection" test set out in G.S.

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§ 15-27.2(c)(1), we further note that the State's attempt to show through statistics that an inspection of the business would be likely to reveal OSHA violations is not sufficient to meet the "probable cause" test under the statute.

[8] Respondents' final contention is that the warrant in the present case does not comply with G.S. § 15-27.2(d)(3) in that it fails to "indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal." As previously noted, the sufficiency of an administrative inspection warrant should properly be determined with reference to its supporting affidavits. *See State v. Murphy, supra*. In fact, G.S. § 15-27.2(d)(2) provides that the warrant "must describe, *either directly or by reference to the affidavit*, the property where the search or inspection is to occur" (Emphasis supplied.) Thus while the warrant in the present case does not specifically indicate the objects of the inspection, the affidavits set out in great detail various objects and conditions that the "inspection is intended to check or reveal," and we hold that it is sufficient to meet the provisions of the statute.

The Order appealed from is affirmed.

Affirmed.

Judges VAUGHN and ARNOLD concur.

MARY ALICE PRESNELL v. JOE A. PELL, JR.; CLINTON W. MOSELEY; GROVER W. HANES, JR.; JAMES R. MARION; CLAUDE V. AYERS; FRED A. HOLDER; BILLY SMITH; DOYLE KEY; TALMAGE CROUSE; JAMES S. NIXON; INDIVIDUALS AND SURRY COUNTY BOARD OF EDUCATION; DENNIS SMITHERMAN, INDIVIDUALLY AND AS PRINCIPAL OF MOUNTAIN PARK ELEMENTARY SCHOOL; AND CHARLES C. GRAHAM, INDIVIDUALLY AND AS THE SUPERINTENDENT OF SURRY COUNTY SCHOOL SYSTEM

No. 7817SC325

(Filed 6 February 1979)

1. Libel and Slander § 14.3— bad faith and malice alleged—pleading of qualified privilege insufficient to require dismissal of action

Where plaintiff, the manager of a public school cafeteria, alleged that defendant school principal made certain defamatory remarks about her which

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caused her discharge from employment, and plaintiff further specifically alleged that the actions of the principal were taken in bad faith and maliciously, such allegations were sufficient to overcome defendants' motion to dismiss based upon qualified or conditional privilege.

2. Administrative Law § 2; Constitutional Law § 23.1; Master and Servant § 10.2; Schools § 13.2— school cafeteria manager—allegedly wrongful discharge without hearing—deprivation of liberty without due process

Since no statute provided plaintiff the right to a hearing prior to her discharge as a public school cafeteria manager, and she failed to pursue the exclusive administrative remedy and appeal therefrom as required by G.S. 115-34, her complaint presented no basis under G.S. 115-34 for the appellate jurisdiction of the trial court over her claim for wrongful discharge; however, plaintiff's allegation that she was discharged from employment because of false accusations that she had brought liquor into the public school in which she was employed and had dispensed it to other employees of the county in the very area in which she worked as cafeteria manager and her further allegations that defendant principal conveyed the reason for her discharge to her fellow employees properly alleged a deprivation of her liberty by the defendants, and the addition of her allegation that she was deprived of her liberty in this manner without the opportunity for a *prior* hearing formed the basis for a justiciable claim of deprivation of liberty without due process.

APPEAL by plaintiff from *Kivett, Judge*. Judgment entered 10 February 1978 in Superior Court, SURRY County. Heard in the Court of Appeals sitting in Winston-Salem 6 December 1978.

This is an action brought by the plaintiff, the manager of a public school cafeteria, alleging that she had been wrongfully discharged from her employment by the defendants. She further alleged that one of the defendants made certain defamatory remarks about her which caused her discharge from employment.

By her complaint the plaintiff, Mary Alice Presnell, alleged that prior to her discharge on 13 December 1976 she had been employed by the defendant, the Surry County Board of Education, as manager of the cafeteria in Mountain Park Elementary School. She had been employed in the cafeteria of that school for a total of eighteen years and had held the position of manager for fourteen years.

The plaintiff alleged that shortly prior to 13 December 1976, the defendant Dennis Smitherman, the principal of the school, falsely accused her of bringing liquor onto the premises of the school and delivering it to painters employed by the County and working in the cafeteria. The plaintiff denied the accusations and

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requested a confrontation with the sources of the information relied on by the principal in making the accusations. The defendant Smitherman refused to identify the individuals who were the sources of his information and denied the plaintiff the opportunity to confront those individuals.

The plaintiff also alleged that sometime prior to 13 December 1976, the defendant Charles C. Graham, the Superintendent of Schools of Surry County, and the defendant Smitherman called the district school committee, the Mountain Park Elementary School Board, into a meeting without notice to the plaintiff and without the plaintiff being present. It was agreed at this meeting to terminate the plaintiff's employment and to discharge her from her duties. The plaintiff was not presented with specifications of charges against her or given the opportunity to be present, heard, present evidence or confront and cross-examine her accusers if any. Additionally, the Surry County Board of Education did not conduct a hearing in connection with the plaintiff's discharge from employment prior to her actual discharge from the position she held.

The plaintiff alleged that the defendant Smitherman terminated her employment on 13 December 1976 based upon the stated false accusations and thereby gave currency to the accusations. She additionally alleged that at the time of her discharge from employment, the defendant Smitherman published the false accusations against her to her fellow employees maliciously and in bad faith.

The plaintiff alleged that her discharge from employment was wrongful and in violation of the General Statutes of North Carolina, the Constitution of the United States and the Constitution of North Carolina. She therefore prayed that the trial court enter an injunction directing the defendants, the members of the Surry County Board of Education, to consider her discharge in the good faith exercise of their duties and to grant her a hearing on appeal before the Surry County Board of Education pursuant to the terms of G.S. 115-34. The plaintiff additionally sought actual and punitive damages for her wrongful discharge. With regard to her claim for relief for defamation by the allegedly false and slanderous remarks made by the defendant Smitherman, the plaintiff sought additional actual and punitive damages. She also

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sought such other and further relief as to which she might be entitled.

The defendants moved to dismiss pursuant to G.S. 1A-1, Rule 12 (b)(6) for failure of the complaint to state a claim upon which relief could be granted and pursuant to G.S. 1A-1, Rule 12(b)(1) for lack of jurisdiction over the subject matter. The trial court entered judgment on 10 February 1978 granting the defendants' motions as to each of the plaintiff's claims for relief for the failure of each to state a claim upon which relief could be granted. Additionally, the trial court granted the defendants' motion to dismiss the plaintiff's claim for relief for wrongful discharge upon the ground of lack of jurisdiction over the subject matter in that the plaintiff had failed to exhaust the administrative remedies provided by G.S. 115-34. From this judgment of the trial court granting dismissal of each of her claims for relief, the plaintiff appealed.

Franklin Smith for plaintiff appellant.

Faw, Folger, Sharpe & White, by Fredrick G. Johnson, for defendants appellees.

MITCHELL, Judge.

[1] The plaintiff assigns as error the trial court's dismissal of her claim for relief for "slander and defamation" based upon her allegations that the principal of Mountain Park Elementary School, the defendant Smitherman, falsely accused her of bringing liquor into her place of employment in the public school and distributing it to others present. She contends that these false allegations caused her to be discharged and reflected discredit upon her character related to her employment. The defendant responds that the trial court's ruling was proper as any statements made about the defendant by the principal were protected as qualifiedly or conditionally privileged communications made in good faith concerning matters which arose from the principal's duties under law. In the present case, however, the plaintiff specifically alleged in her complaint that the actions of the principal were taken in bad faith and maliciously. Such allegations are sufficient at the pleading stage of an action to overcome the defense of conditional or qualified privilege which arises only from good faith actions. 8 Strong's N.C. Index 3d, Libel and Slander § 9, p. 343. A communication which is qualifiedly privi-

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leged is actionable upon a showing of actual malice. *R. H. Bouligny, Inc. v. United Steel Workers of America*, 270 N.C. 160, 154 S.E. 2d 344 (1967). Therefore, the plaintiff's specific allegation of malice was sufficient when taken with the other allegations of her complaint to overcome the defendants' motion to dismiss based upon qualified or conditional privilege.

The plaintiff alleged in the complaint that the principal, the defendant Smitherman, falsely and maliciously accused her of bringing liquor into the area of the public school in which she was employed as cafeteria manager and dispensing the liquor to other county employees present. She also alleged that the principal unnecessarily and excessively publicized these false accusations by relating them to the plaintiff's fellow employees, who apparently had no responsibility concerning the determination as to whether the plaintiff's employment should be terminated. Such allegedly false accusations imputed conduct derogatory to the character and standing of the plaintiff as a public employee and tended to prejudice her in her capacity as a public employee and were actionable per se. *Badame v. Lampke*, 242 N.C. 755, 89 S.E. 2d 466 (1955); *Stewart v. Nation-Wide Check Corp.*, 9 N.C. App. 172, 175 S.E. 2d 615 (1970), *rev'd on other grounds*, 279 N.C. 278, 182 S.E. 2d 410 (1971); Annot., 6 A.L.R. 2d 1008 (1949); Annot., 58 A.L.R. 1157 (1929). The allegations of the plaintiff's complaint set forth a claim for relief for slander which, for the reasons previously stated herein, was not defeated by the defendants' defense of conditional or qualified privilege.

We note that the allegations of the plaintiff's complaint also presented a claim for relief for the common-law wrong of malicious interference with contractual rights, as it indicates that some of the allegedly false statements were maliciously employed as the means of bringing about the plaintiff's discharge from her employment. The plaintiff has not, however, sought to pursue a claim for relief based upon this theory by exception, assignment of error or argument and we deem it abandoned.

In *Johnson v. Graye*, 251 N.C. 448, 111 S.E. 2d 595 (1959), the Supreme Court of North Carolina held that a complaint by a teacher against a principal setting forth allegations similar to those presented by the complaint of the plaintiff in the present case established a claim for relief for malicious interference with

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contractual rights and not a claim for libel or slander. We do not, however, view *Johnson* as authority for the proposition that one course of conduct cannot support claims for relief on both theories of slander and malicious interference with contractual rights. That case presented a fact situation in which the allegedly false accusations functioned only as a means employed in procuring the plaintiff's discharge from employment. Here, on the other hand, the plaintiff specifically alleged that, in addition to being used as the means to secure her discharge, the false and malicious accusations were published to her fellow employees who had no responsibility for or participation in her discharge thereby causing additional damages. We do not think that the holding in *Johnson* in any way prevented the plaintiff from properly pursuing a claim for relief for both defamation and malicious interference with contractual rights based on the allegations set forth in her complaint. Nor do we think *Johnson* provided authority for the trial court's judgment dismissing the claim for relief for slander which she chose to pursue.

For purposes of a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the allegations of the complaint must be treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). A complaint is sufficient to withstand the motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and the allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A plaintiff's claim for relief should not be dismissed unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Viewed in light of these rules, we find that the plaintiff's claim for relief for defamation was sufficient to withstand the defendants' motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) and that the trial court erred in granting that motion.

[2] The plaintiff also assigns as error the dismissal by the trial court of her claim for relief based upon her allegations that she was wrongfully discharged from her employment as cafeteria manager of Mountain Park Elementary School. In support of this

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assignment, the plaintiff contends that she was wrongfully discharged without the opportunity for a prior hearing and that her discharge in this manner violates G.S. 115-34. The defendants respond that the plaintiff failed to exhaust her administrative remedies as provided by G.S. 115-34. They further contend that this failure to exhaust the administrative remedies provided by that statute deprived the trial court of subject matter jurisdiction over the plaintiff's claim for relief for wrongful discharge and that the trial court's ruling dismissing this claim for relief pursuant to G.S. 1A-1, Rule 12(b)(1) and (6) was, therefore, correct.

For the purposes of this appeal, it is unnecessary for us to consider or determine whether any group or person other than the Surry County Board of Education had authority to discharge the plaintiff. *Compare* G.S. 115-35(b) *with* G.S. 115-58. The plaintiff has alleged in her complaint that she was in fact denied continued employment in the school by the alleged acts of the defendant Smitherman and others and has, therefore, presented a colorable claim of "discharge" from employment.

No General Statute of North Carolina specifically requires that a hearing be afforded individuals employed as cafeteria workers or managers in public schools *prior* to their discharge from employment. G.S. 115-34 does provide such individuals the right to appeal any such discharge to the appropriate county or city board of education. That statute further provides that such individuals may appeal the resulting decision by the county or city board of education to superior court if the decision is one affecting the individual's "character or right to teach." Instead of pursuing the procedure set forth in G.S. 115-34 and later appealing an adverse decision to superior court, the plaintiff chose to initiate this action by filing a complaint in superior court. As no statute provides the plaintiff the right to a hearing prior to discharge, and she has failed to pursue the exclusive administrative remedy and appeal therefrom as required by G.S. 115-34, her complaint presented no basis under G.S. 115-34 for the appellate jurisdiction of the trial court over this claim. *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Elmore v. Lanier*, 270 N.C. 674, 155 S.E. 2d 114 (1967).

The plaintiff additionally contends, however, that her allegedly wrongful discharge without the opportunity for a prior hearing was violative of the Due Process Clause of the Fourteenth

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Amendment to the Constitution of the United States and, thus, presented the trial court with a claim over which it had jurisdiction. We find this contention meritorious.

By her complaint the plaintiff alleged that she was discharged by the defendant Smitherman after consultation by him with the "local board of education." It is apparent from the face of the complaint that the reference to a "local board of education" was actually a reference to a district school committee established pursuant to G.S. 115-70 for the district for which the Mountain Park Elementary School was located. The plaintiff alleged in her complaint that her discharge was based upon false accusations that she had taken liquor onto the premises of the school and given it to painters employed by the county and working in the school cafeteria in which the plaintiff was employed as manager. She additionally alleged that this reason for her discharge was made public by the defendant Smitherman when he conveyed it to the plaintiff's fellow employees.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States contains the specific commandment "nor shall any state deprive any person of life, liberty, or property, without due process of law." Although the plaintiff alleged that she was employed on a year-to-year contract basis, it is unnecessary for us to consider this allegation or to determine whether she possessed a resulting property interest in her employment in this case. We find her complaint states a claim for relief for deprivation of liberty without a hearing and, therefore, without due process of law, even if her employment was terminable at will.

Mere nonretention or discharge of a public employee whose position is terminable at the will of the employer will not alone suffice to support a claim for deprivation of the employee's liberty. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972); *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976). In such cases the employee remains as free as before to seek another job and is not deprived of liberty. However, in *Roth* the Supreme Court of the United States specifically pointed out that:

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The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." . . . In such a case, due process would accord an opportunity to refute the charge before Univeristy officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . The Court has held for example, that a State, in regulating eligibility for a type of professional employment cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," . . . and, specifically, in a manner that denies the right to a full prior hearing.

408 U.S. 564, 573-74, 33 L.Ed. 2d 548, 558-59, 92 S.Ct. 2701, 2707.

The plaintiff in the present case alleged that she was discharged from employment by virtue of false accusations that she had brought liquor into the public school in which she was employed and had dispensed it to other employees of the county in the very area in which she worked as cafeteria manager. Should it be determined that this allegation of the complaint is true, we think it sufficient to present a situation in which her "good name, reputation, honor, or integrity is at stake." Cf. Annot., 6 A.L.R. 2d 1008 (1949). Cf. Annot., 58 A.L.R. 1157 (1929) (allegations of drunkenness touching one in relation to his trade). The plaintiff additionally alleged that the accusations which formed the basis for her discharge from employment were not true and were publicized. Therefore, her complaint properly alleged a deprivation of her liberty by the defendants. The addition of her allegation that she was deprived of her liberty in this manner without the opportunity for a *prior* hearing formed the basis for a

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justiciable claim of deprivation of liberty without due process. *Board of Regents v. Roth*, 408 U.S. 564, 574, 33 L.Ed. 2d 548, 559, 92 S.Ct. 2701, 2707 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599, 33 L.Ed. 2d 570, 578, 92 S.Ct. 2694, 2698 (1972). See *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976).

It is correct, of course, that G.S. 115-34 provided the plaintiff an opportunity for a hearing by the Surry County Board of Education for the purpose of an appeal reviewing the actions of school personnel with regard to her discharge. That statute, however, gave authority only for a hearing *after* the decision to discharge her had been made. It is also correct, as stated by the defendants, that, "[W]hen the legislature has provided an *effective* administrative remedy, it is exclusive." *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E. 2d 12, 15 (1970) (emphasis added). Here, however, the legislature provided the plaintiff the opportunity for a hearing *after* her discharge from employment, while the Constitution entitled her to such hearing *prior* to her discharge. An administrative remedy which does not comply with the mandates of the Constitution cannot be held to constitute an *effective* administrative remedy. As the plaintiff did not have an effective administrative remedy, she was not required to exhaust her administrative remedies before bringing this action in the trial court. For these reasons, we find that the trial court erred in dismissing, pursuant to G.S. 1A-1, Rule 12(b)(1) and (6), the plaintiff's claim for relief for wrongful discharge from employment in violation of the Fourteenth Amendment.

For the reasons previously set forth, we hold that the judgment of the trial court granting the defendants' motions to dismiss the plaintiff's claims for relief for wrongful discharge from employment and for slander must be and is hereby reversed and the cause remanded for further proceedings in accordance with the Constitution of the United States and applicable law.

Reversed and remanded.

Judges CLARK and WEBB concur.

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STATE OF NORTH CAROLINA v. ROBERT LEE BROWN

No. 7816SC882

(Filed 6 February 1979)

1. Constitutional Law § 56; Criminal Law § 91—jurors in courtroom during guilty pleas and evidence in other cases—G.S. 15A-943—right to impartial jury

The trial of defendant by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases did not contravene the language and objectives of G.S. 15A-943, which prohibits the calendaring of jury cases in certain counties on a day arraignments are calendared, since the legislative intent in enacting G.S. 15A-943 was to minimize the imposition on the time of jurors and witnesses, not to insure the impartiality of jurors; nor did such procedure violate defendant's right to be tried by an impartial jury.

2. Criminal Law § 102.9—prosecutor's characterizations of defendant as killer, robber, thief—no prejudice

In a prosecution for armed robbery, statements by the assistant district attorney that defendant was not a "gentleman," that he was a ".44 caliber killer," a "robber" and a "thief" were not prejudicial to defendant since evidence supported such characterizations of defendant except for the word killer, to which defense counsel promptly objected and was sustained by the court; furthermore, the prosecution's point that armed robbery was a crime next in severity only to murder was a valid one.

3. Criminal Law §§ 102.5, 170.2—absence of witness—question by prosecutor

Defendant was not prejudiced by the prosecutor's question, "Fred Drye ain't going to come in here and to this Courtroom and swear to a pack of lies, is he?" since it could not have affected the outcome of the case.

4. Criminal Law § 66.11—identification of defendant—no illegal procedures—no mistaken identification

Evidence in an armed robbery prosecution was sufficient to support the trial court's findings that the witness had ample opportunity to observe defendant at the crime scene; nothing suggested a misidentification of defendant; no illegal identification procedures were used; and the confrontation two and one-half hours after the alleged robbery when defendant was brought into the witness's store by officers was not necessarily suggestive or conducive to irreparable mistaken identification.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 2 June 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals 15 January 1979.

Defendant was indicted for armed robbery, a violation of G.S. 14-87. Defendant was tried by a jury and a verdict of guilty was

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returned. From judgment sentencing him to 20 years in the North Carolina Department of Correction, defendant appeals.

The record discloses that on Wednesday morning of that session of court, and prior to the calling of the case, counsel for defendant objected to the taking of any pleas in the presence of the prospective jurors. The objection was overruled.

Evidence for the State tended to show that Woodrow Wilson Johnson was the proprietor of a store selling general merchandise and gasoline. Johnson testified that a gray Plymouth automobile pulled into his service station around 10:00 a.m. on 15 February 1978. The witness was asked if he could identify the person in the automobile and counsel for defendant objected. A *voir dire* was then conducted, and the trial court found facts and concluded that the identification of defendant by this witness was proper.

The witness Johnson then testified that the man driving the Plymouth automobile was the defendant. Johnson asked the defendant if he wanted gas and was told to fill it up. Johnson took the license number of the automobile and wrote it down. The defendant then entered the store with a pistol, robbed the prosecuting witness's cash register and took his wallet, and left the store after having made Mr. Johnson lie on the floor. Johnson then called the Robeson County Sheriff's Department and gave them a description of the individual, of his car, and the license plate number. Detective Luther Sanderson testified that he subsequently located the suspect's vehicle at the trailer of one Velma Butler. After an investigation, the defendant was apprehended, identified by Johnson, and arrested for armed robbery.

The defendant admitted to police officials that he had been the only individual using his car on the morning of the robbery. The police officers also recovered from the defendant's residence a bag of money and an overcoat which was allegedly worn in the robbery.

The defendant testified in his own behalf and denied that he committed the robbery. He did admit that the clothing, bag, and car were his. Defendant further testified that Johnson's identification of him was in error as was his identification of the automobile and license tag number.

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Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Adelaide G. Behan and I. Murchison Biggs, for defendant appellant.

CARLTON, Judge.

[1] Defendant contends first that the trial court committed prejudicial error in permitting the case to be tried by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases. He argues that the procedure followed in the trial court contravenes the language and objectives of G.S. 15A-943 and violates his right to be tried by an impartial jury. We find no merit in this assignment of error.

G.S. 15A-943 provides that, in counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. Particularly pertinent to defendant's argument here is that portion of the statute which reads as follows: "No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared." Defendant interprets the quoted portion of the statute to indicate a legislative intent that prospective jurors not be allowed to observe proceedings involving other defendants because they might somehow become prejudiced against a defendant who might later be tried before them.

This was obviously not the intent of our legislature in enacting 15A-943. The official commentary to G.S., Chap. 15A, Art. 51, in which G.S. 15A-943 is included, states the purposes of the article and provides in part as follows: "Time for jurors and witnesses will be saved if matters not requiring their presence can be disposed of before they are brought in. The commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided."

We believe the legislative intent in enacting this statute was to minimize the imposition to the time of jurors and witnesses,

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and we reject defendant's argument that it was designed as a new approach to ensure the impartiality of jurors.

In this same connection, defendant also argues that the procedure employed violates the defendant's right to be tried by an impartial jury. Without citing authority, defendant generally argues that prospective jurors become biased against all defendants when hearing the proceedings which precede the sentencing of those who plead guilty. He argues that law enforcement officials are more likely to be given greater credence by the jury and that the jury may stray from their function as fact finders and only consider the prosecution's side of the case. We also reject that argument.

Unquestionably, a defendant in a criminal trial has the right to a fair, unbiased, and impartial jury. G.S. 9-15(a) is one of many safeguards to insure that right. That statute provides that in selecting the jury, the court, or any party to an action, has the right to make direct oral inquiry as to the fitness and competency of any person to serve as a juror. The *voir dire* examination of jurors allowed by that statute serves the dual purpose of ascertaining whether grounds exist for challenge for cause and to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). The record before us does not indicate that any of the jurors who served could not fairly and intelligently have reached a verdict; nor does it indicate the use of any peremptory challenges by the defendant. Hence, defendant has failed to show that any member of the jury was unable to give him a completely fair trial.

The burden of showing such prejudicial denial of a fair trial falls on the defendant. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). The record before us is barren of any showing of prejudice in the method used for selection of jurors. Indeed, we are unable to determine from this record whether counsel for defendant even made inquiry of prospective jurors on the *voir dire*.

[2] Defendant's second assignment of error is that certain language used by the assistant district attorney was prejudicial to the defendant and exceeded the bounds of propriety. While we do not approve of some of the language used, we do not find it to be sufficiently prejudicial to require a new trial.

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In his final presentation to the jury, the assistant district attorney argued that armed robbery is one of the most serious crimes in North Carolina and, in that connection, stated, "[I] suppose, maybe, if he destroyed that witness, there wouldn't be any case at all. And that's just how close it is to first degree murder." At another point in the jury argument, the assistant district attorney stated: "Because, but for the grace of God, Mr. Johnson's ability to keep his wits about him, we got the .44 caliber killer sitting over there"

Following objection, the trial court ordered the word "killer" stricken. Defendant, however, cites as error the trial court's failure to sustain his objection to the entire discourse of the assistant district attorney concerning first degree murder.

During cross-examination of the witness Johnson, the following exchange took place:

MISS BEHAN: Now, sir, the gentleman that you saw in the store on February 15, describe any facial hair that he may have had?

MR. BOWEN: I OBJECT to him being referred to as a "gentleman". He's a robber and a thief.

MISS BEHAN: OBJECTION, Your Honor, This is a conclusion.

COURT: Sustained. Conclusion. Sustained all the way around.

Defendant also asserts that prejudice resulted from heated discussion between his counsel and the assistant district attorney as evidenced by the following exchange during the prosecution's final argument to the jury:

Now, Ladies and Gentlemen of the Jury, it makes me cringe when I see good citizens who have taken their time out from work because they have been commanded to come up here and serve on the jury—it makes me cringe to see that games are being played with you, and—

MISS BEHAN: OBJECTION, Your Honor.

MR. BOWEN: —I resent the fact that suggestions are —

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MISS BEHAN: OBJECT to his use of the word "games".

COURT: OBJECTION sustained. Don't use the word "games".

MR. BOWEN: All right. You decide what they are, Ladies and Gentlemen of the Jury, but, now, I'm quoting from the public record right here, the subpoenas that Miss—the lady lawyer is talking about here.

MISS BEHAN: OBJECT.

MR. BOWEN: Fred—

COURT: Wait, wait. OBJECTION sustained.

MR. BOWEN: Drye, 21—

COURT: Wait, Did you hear me?

MR. BOWEN: Yes, sir.

COURT: You would have to read all the subpoenas to get them in.

MR. BOWEN: I will be happy to.

COURT: No, you won't do it.

Several rules have evolved with respect to alleged improper remarks by the prosecution. Argument of counsel must be left largely to the control and discretion of the presiding judge, and counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949); *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542 (1947). Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom, together with the relevant law, so as to present his side of the case. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). He may not, however, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not "travel outside of the record" or inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Phillips*, 240

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N.C. 516, 82 S.E. 2d 762 (1954); *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953). It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). On the other hand, when the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. *State v. Bowen*, *supra*.

In the instant case, the assistant district attorney, as noted contextually above, stated that the defendant was not a "gentleman", that he was a ".44 caliber killer", a "robber" and a "thief." The use of epithets which are warranted by the evidence have been approved by our Supreme Court. *State v. Bowen*, *supra*, and *State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975). Defendant here was charged with armed robbery and there was ample evidence to support that charge. As noted in *Wortham*, *supra*, at 546, "An armed robber is a thief, a robber, and certainly a thief and a robber may be aptly characterized as a scoundrel." Also, there was adequate evidence that a .44 caliber pistol was used in the commission of the crime. The closest the assistant district attorney came to traveling outside the record was in using the word "killer." While the prosecution came perilously close to exceeding the bounds of propriety in the use of that word, we do not believe that, taken contextually, it was prejudicial to defendant. In the first place, defense counsel's prompt objection to the use of the word was sustained by the court and the jury was admonished not to consider it. The trial judge's prompt action removed any possibility of reversible error. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied*, 403 U.S. 940, 91 S.Ct. 2258, 29 L.Ed. 2d 719 (1971); *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938). Moreover, the prosecution's point that armed robbery is a crime next in severity only to murder is a valid one.

Defendant also argues that it was improper for the prosecutor to state "that games are being played" with the jury. Here, again, the trial court promptly sustained defendant's objection. Moreover, the argument was within the bounds of the evidence presented in that defendant had testified that he had

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been with someone else at the time of the commission of the crime and there was testimony as to whether the witness was subpoenaed and at what address.

[3] Defendant also argues that the following question posed by the prosecutor was improper: "Fred Drye ain't going to come in here and to this Courtroom and swear to a pack of lies, is he?" This question is similar to that cited by the defendant in *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). There, the prosecutor asked defendant if he had subpoenaed a certain witness and the defendant answered that the witness did not want to come to court. The prosecutor then asked, "He didn't want to go on the stand and perjure himself, did he?" The Supreme Court held the question was objectionable but that it was inconceivable that it affected the outcome of the case and, therefore, was not prejudicial error. Moreover, the Supreme Court has held it permissible to question a defendant as to the failure to produce exculpatory testimony from witnesses available to the defendant. *State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977).

We also find no merit in defendant's argument that the personalities of counsel were injected into the trial of this action and that heated discussions took place to the extent that defendant was prejudiced.

Our review of the record discloses that the trial judge maintained firm control over the conduct of the participants and exercised sound discretion in every instance. With no gross impropriety appearing of record, we will not attempt to substitute our judgment for that of the trial court. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

Again, we consider it proper to observe that the assistant district attorney came dangerously close to crossing the line from allowable language to that which would require reversal.

[4] Defendant's final assignment of error is that the trial court committed error in admitting the identification testimony of the witness, Woodrow Johnson. Defendant argues that the testimony was tainted since the only time the witness observed the defendant after the incident was in the presence of police officers or his counsel and since the description of the defendant, other than the fact that the defendant was the robber, was nondescript. We do not agree.

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When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification made under constitutionally impermissible circumstances, the trial court is required to make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971). The trial court concluded from the *voir dire* that there was ample opportunity for the witness to observe the defendant, that nothing appeared in the evidence to suggest a misidentification of the defendant, that no illegal identification procedures were used and that the confrontation 2½ hours after the alleged robbery when the defendant was brought into the witness's store by officers was not unnecessarily suggestive or conducive to lead to irreparable mistaken identification. The trial court's findings are supported by plenary uncontradicted evidence and defendant's objection to the in-court identification testimony of Woodrow Johnson was properly overruled.

For the reasons stated, we find that the defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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THE STATE OF NORTH CAROLINA v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY

THE STATE OF NORTH CAROLINA v. GEORGE HENRY TALBOT

THE STATE OF NORTH CAROLINA v. MID-SOUTH INSURANCE COMPANY

THE STATE OF NORTH CAROLINA v. WALTER BURNS CLARK

No. 7810SC777

(Filed 6 February 1979)

**Elections § 15— insurance company's contributions to "John Ingram Breakfast"—
no violation of statutes**

An insurance company's contribution of money for an appreciation breakfast for John Ingram after his reelection as Commissioner of Insurance of North Carolina did not violate criminal statutes prohibiting the payment of money by insurance companies for or in aid of any political organizations or candidates or for "any political purpose whatsoever," G.S. 163-270 and G.S. 163-278.19(a).

Judge MARTIN (Harry C.) dissenting

APPEAL by the State of North Carolina from *Preston, Judge*.
Order entered 11 July 1978 in Superior Court, WAKE County.
Heard in the Court of Appeals 6 December 1978.

The facts in this case are undisputed. Defendant George Talbot, President of defendant Charlotte Liberty Mutual Insurance Company, received an invitation in the mail, after the reelection of Ingram as Commissioner of Insurance of North Carolina, which read:

"You are Invited to Join Commissioner and Mrs. John Ingram Buffet Breakfast Saturday, January 8th, 1977 Eight O'clock-Nine Thirty O'clock a.m. Velvet Cloak Inn, Raleigh, North Carolina"

No further invitation or contact was received. While he was seated at the breakfast, defendant Talbot was asked to make a contribution to help pay the cost of the breakfast. Mr. Talbot

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stated that he only had a company check and asked if it would be all right to use it. He was told that it would be all right to use a company check, because the breakfast was not a political function. Mr. Talbot then wrote a \$500.00 check to "John Ingram Breakfast" on the account of Charlotte Liberty Mutual Insurance Company. The check was listed on the books and records of the company, just as written, under company contributions. No attempt has ever been made to hide the check or the fact of its existence.

On 11 April 1978, the State obtained criminal summons charging the defendants with violating G.S. 163-270 and G.S. 163-278.19(a).

The facts relating to defendants Walter Clark and Mid-South Insurance Company are essentially the same. Defendant Clark, President of defendant Mid-South Insurance Company, received an invitation to attend the appreciation breakfast for John Ingram, who had been elected and certified as Commissioner of Insurance of North Carolina. Defendant Clark was contacted by telephone three times before the breakfast and was asked whether he would contribute money to defray the expenses of the breakfast. Five hundred dollars was the amount suggested. After being assured that it was not a political function, Clark sent a company check for \$500.00 to "John Ingram Appreciation Breakfast" from Fayetteville to Mr. Howard Bloom in Roanoke Rapids.

On 11 April 1978, the State filed criminal summons charging the defendants Clark and Mid-South Insurance Company with violating G.S. 163-270 and G.S. 163-278.19(a). All of the defendants moved to quash the summons on the grounds that either (1) the summons failed sufficiently to charge a criminal offense, or (2) the summons in each case charged violations of statutes which are unconstitutional as applied. The motions to quash were granted on both grounds by District Court Judge Winborne. On appeal to the Superior Court, Wake County, Judge Preston affirmed.

The State appeals pursuant to G.S. 15A-1445(a)(1).

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Attorney General Edmisten by Associate Attorney Christopher P. Brewer, for the State.

Cansler, Lockhart, Parker & Young, by Joe C. Young and Bruce M. Simpson, for defendant appellees, Charlotte Liberty Mutual Insurance Company and George Talbot.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Donald W. McCoy, for defendant appellees, Mid-South Insurance Company and Walter Burns Clark.

ERWIN, Judge.

The appellant contends that the Superior Court erred in affirming the District Court's order to quash the criminal summons, because the statutes involved are (1) constitutional on their face, (2) constitutional as applied, and (3) proscribe the conduct alleged in each summons. We hold that the summons in each case fails sufficiently to charge a criminal offense under G.S. 163-270 or G.S. 163-278.19(a).

G.S. 163-270 provides in relevant part:

"§ 163-270. *Using funds of insurance companies for political purposes.*—No insurance company or association, including fraternal beneficiary associations, doing business in this State shall, directly or indirectly, pay or use, or offer, consent or agree to pay or use, any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint-stock company, or other association organized or maintained for political purposes, or for or in aid of any candidate for political office or for nomination for such office, or for any political purpose whatsoever. . . . An officer, director, stockholder, attorney or agent for any corporation or association which violates any of the provisions of this section, who participates in, aids, abets, advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars (\$1,000)."

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G.S. 163-278.19(a) provides in relevant part:

“§ 163-278.19. *Violations by corporations, business entities, labor unions, professional associations and insurance companies.*—(a) Except as provided in G.S. 163-278.19(b), it shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly:

- (1) To make any contribution or expenditure (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) in aid or in behalf of or in opposition to any candidate or political committee in any election or *for any political purpose whatsoever*;
- (2) To pay or use or offer, consent or agree to pay or use any of its money or property for or in aid of or in opposition to any candidate or political committee or for or in aid of any person, organization or association organized or maintained for political purposes, or for or in aid of or in opposition to any candidate or political committee or *for any political purpose whatsoever . . .*” (Emphasis added.)

G.S. 163-270 and G.S. 163-278.19(a) are both located in Chapter 163. G.S. 163-270 is located in Article 22, Subchapter VIII of Chapter 163, entitled “*Corrupt Practices and Other Offenses Against the Elective Franchise.*” G.S. 163-278.19(a) is located in Article 22A, Subchapter VIII of Chapter 163, entitled “*Regulating Contributions and Expenditures in Political Campaigns.*” When, as here, the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act. *Porter v. Yoder & Gordon Co.*, 246 N.C. 398, 98 S.E. 2d 497 (1957).

In *Louchheim, Eng & People v. Carson*, 35 N.C. App. 299, 304, 241 S.E. 2d 401, 404-05 (1978), we perceived the purpose of G.S. 163-278.19 to be identical to those of its federal counterpart. We said:

“The purpose of the federal statute regulating campaign contributions and expenditures by corporations and labor

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unions, 2 U.S.C. § 441(b) (1976) (formerly 18 U.S.C. § 610), which is similar in its language and scope to our own statute, is to protect the populace from undue influence by corporations and labor unions, and to insure the responsiveness of elected officials to the public at large. *United States v. C.I.O.*, 335 U.S. 106, 92 L.Ed. 1849, 68 S.Ct. 1349 (1948); Annot., 24 A.L.R. Fed. 162 (1975). As we read G.S. 163-278.19, we perceive its purposes to be identical to those of its federal counterpart. Our Legislature, as well as Congress, has specified that the advance of money by a corporation in behalf of a political candidate is frustrative of these purposes."

In *Louchheim, supra*, campaign contributions expressly prohibited by G.S. 163-278.19 were in question. In the instant case, no campaign contributions are involved. Mr. Ingram's election had been certified at the time of the contribution; he was not a candidate for political office.

G.S. 163-278.6(4) defines a candidate as follows: "The term 'candidate' means any individual who has filed a notice of candidacy for public office listed in G.S. 163-278.6(18) with the proper board of elections."

Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *Transportation Service v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973); *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972).

The State contends that defendants' conduct in the instant cases fall within the ambit of the prohibitions of G.S. 163-270 and G.S. 163-278.19(a) because of the words employed in both statutes prohibiting the payment of money by insurance companies or their agents *for any political purpose whatsoever*.

Statutes creating penal offenses must be strictly construed. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967); *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). See also *Schwartz v. Romnes*, 495 F. 2d 844 (2d Cir. 1974); *State ex rel. Wright v. Carter*, 319 S.W. 2d 596 (Mo. App. 1958). The doctrine of *ejusdem generis* is applicable here. The doctrine of *ejusdem generis* requires that general words of a statute which follow a designation

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of particular subjects or things be restricted by the particular designations to things of the same kind, character, as nature and those specifically enumerated. *In re Dillingham, supra; accord, Schwartz v. Romnes, supra.*

After applying the doctrine of *ejusdem generis* in a similar statute, the Second Circuit Court of Appeals, in *Schwartz, supra*, noted the statute's purpose:

"Thus the avowed objective was not to bar all corporate expenditures with respect to legislative matters generally but to prohibit corporate contributions to candidates or parties, since such contributions might tend to create political debts . . ." 495 F. 2d 844, 850 (2d Cir. 1974).

Our Legislature had a similar purpose in enacting G.S. 163-278.19(a). See *Louchheim, supra*. We hold that the criminal summons fail to state an offense within the ambit of these statutes. We note the recent enactment in 1977 of G.S. 163-278.36 in rendering our decision. The statute provides:

"§ 163-278.36. *Elected officials to report funds.*—All contributions to, and all expenditures from any 'booster fund,' 'support fund,' 'unofficial office account' or any other similar source which are made to, in behalf of, or used in support of any person holding an elective office for any political purpose whatsoever during his term of office shall be deemed contributions and expenditures as defined in this Article and shall be reported as contributions and expenditures as required by this Article. The annual report shall show the balance of each separate fund or account maintained on behalf of the elected office holder."

G.S. 163-270 and G.S. 163-278.19(a) are directed at an evil other than the one presented here. There is no showing of any attempt to influence an elected official. The fact that a particular activity may be within the same general classifications and policy of those covered does not necessarily bring it within the ambit of the criminal prohibitions involved here. See *United States v. Boston & Maine R.R.*, 380 U.S. 157, 13 L.Ed. 2d 728, 85 S.Ct. 868 (1965); accord, *State v. Terre Haute Brewing Co.*, 186 Ind. 248, 115 N.E. 772 (1917).

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Our holding that the summons in these cases fail sufficiently to charge an offense within the ambit of these statutes dispenses with the need to resolve the constitutional challenges raised by defendants.

The order entered below is

Affirmed.

Chief Judge MORRIS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

Each corporate defendant was charged by separate criminal summons with violating N.C.G.S. 163-270 and N.C.G.S. 163-278.19. Each individual defendant was charged by separate criminal summons with aiding and abetting the respective corporate defendants in violating these statutes; all summons were substantially the same. The summons against Charlotte Liberty Mutual is as follows:

THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that on or about the eighth day of January, 1977, in the county named above, the Charlotte Liberty Mutual Insurance Company was an insurance company doing business in North Carolina and did pay five hundred dollars in United States currency for and in behalf of and in aid of the successful candidate for the political office of Commissioner of Insurance of the State of North Carolina John Randolph Ingram and for the political purpose of honoring the said Commissioner and demonstrating widespread grass roots support for his programs by support of a large attendance at an appreciation breakfast preceding his inaugural ceremonies in violation of GS 163-270 and GS 163-278.19(a); that the said money was paid by means of a corporate check dated January 8, 1977, payable to John Ingram Breakfast in the amount of \$500.00 drawn against account number 1030162 of North Carolina National Bank, Charlotte, N. C., signed George H. Talbor [*sic*] and Lorraine Woods, a copy of which is attached and incorporated herein by reference.

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The district court had original jurisdiction of these cases. The district court judge quashed each summons for either failing to charge a criminal offense or being based upon statutes unconstitutional in their application. The district court judge did not state upon which reason his order was based.

The State appealed to superior court pursuant to N.C.G.S. 15A-1432(a)(1). The superior court entered an order pursuant to N.C.G.S. 15A-1432(e) affirming the judgment of the district court. The State appealed to this Court pursuant to N.C.G.S. 15A-1445(a)(1).

The learned majority holds the summons in these cases do not sufficiently charge an offense within the meaning of the statutes and for this reason affirmed the superior court judge in quashing the process. They did not reach or resolve any constitutional challenges to the statutes.

Under this holding the sole question is whether the summons allege sufficient facts to charge a crime proscribed by the statutes. This depends solely upon the language in the summons. The statutes in question are written in plain, everyday words. I find no doubt as to the meaning of the statutes. Their meaning is clear. As applied to these charges, they simply mean no insurance company shall pay any money for or in aid of any political organization or association organized for political purposes, or pay any money in aid of any candidate. N.C. Gen. Stat. 163-270 and N.C. Gen. Stat. 163-278.19.

The standards to be applied in passing upon motions to quash criminal warrants are set forth in *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953). In *Greer*, Parker, J. (later Chief Justice), speaking for the Court says:

The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court,

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on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

. . . To simplify forms of indictment G.S. 15-153 was enacted which in respect to quashing indictments provides in respect to indictments that every criminal proceeding by indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible, and explicit manner, and the same shall not be quashed, by reason of any informality or refinement, if in the bill sufficient matters appear to enable the court to proceed to judgment.

The quashing of indictments is not favored. *State v. Flowers*, 109 N.C. 841, 13 S.E. 718 (1891). The general rule in North Carolina is that an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. *State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943). An indictment may follow the language of the statute when the statute defines the offense and contains all that is essential to constitute the crime and to inform the accused of its nature; but if a particular clause in a statute does not set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill. *State v. Cole*, 202 N.C. 592, 163 S.E. 594 (1932).

When these standards are applied to these cases, it is clear that the criminal summons are sufficient to withstand the motions to quash. By placing the summons alongside the statutes, it can be plainly seen that the summons state a charge under the statutes:

Statutes

1. No insurance company shall
2. pay money
3. to or in aid of
4. any association
5. organized for political purposes, or [pay money]
for or in aid of any candidate for political office.

Summons

1. Charlotte Liberty Mutual Insurance Company
2. paid \$500 by check
3. to or in aid of
4. "John Ingram Breakfast"
5. organized for political purpose of honoring and demonstrating support for Ingram and in aid of Ingram successful candidate for Commissioner of Insurance.

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Surely, the payments were to aid John Ingram. The summons do not state where the breakfast was held or the menu, but \$500 for breakfast would be unreasonable in New York City or Paris, *a fortiori*, Raleigh.

The majority holds Ingram was no longer a "candidate" within the meaning of the statutes at the time of the payments because the election was completed. True, N.C.G.S. 163-278.6(4) defines "candidate," and Ingram fell within that definition. That statute does not state when one ceases to be a "candidate." To hold that an insurance company can contribute to a person after he is elected but not before, is plainly contrary to the intent of the legislature.

To hold as a matter of law that the "John Ingram Breakfast" was not an "association organized . . . for political purposes" within the meaning of the applicable statutes is to ignore the political facts of life in North Carolina.

The summons identify with certainty the offense: the giving of \$500.00 to "John Ingram Breakfast," an association organized for political purposes, in aid of Ingram. They state facts to prevent double jeopardy: the date, amount, recipient and purpose of the payment is alleged; the checks are attached to the summons. Those facts are sufficient to enable the defendants to prepare for trial. The summons are sufficient to advise the court of the crime alleged, the statutes violated, and to enable the court to pass sentence.

The summons comply with the standards set forth in *Greer*, *supra*, and N.C.G.S. 15-153.

The majority holds that the statutes "are directed at an evil other than the one presented here." I find that the evil presented here is a violation of the statutes and that the summons properly so allege. I vote to hold the summons are valid and to reverse the judgment of the superior court.

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**IN THE MATTER OF THE REVOCATION OF THE LICENSE OF ROBERT
MORGAN GARDNER LICENSE NO. 4835030**

No. 783SC263

(Filed 6 February 1979)

1. Arrest and Bail § 3— warrantless arrest—when permissible

Since the effective date of G.S. 15A-401(b)(2), a law enforcement officer is authorized to arrest for a felony not committed in his presence any person who he has probable cause to believe has committed the felony, and he is authorized to arrest for a misdemeanor not committed in his presence any person who he has probable cause to believe has committed the misdemeanor and who he also has probable cause to believe either (1) will not be apprehended unless immediately arrested, or (2) may cause physical injury to himself or others or damage to property unless immediately arrested.

2. Arrest and Bail § 3.8— drunk driving—offense committed outside officer's presence—legality of warrantless arrest

An officer had probable cause to arrest petitioner without a warrant for the misdemeanor of driving a vehicle on a highway while under the influence of intoxicating liquor committed outside the officer's presence where the officer knew by his own observation at the scene of an accident that petitioner was highly intoxicated, knew based on information given by a disinterested eyewitness to the accident that petitioner had only a short time previously driven his truck on the highway, and had reasonable cause to believe, in view of the well known propensity of intoxicated persons to engage in irrational and erratic behavior, that petitioner, if not immediately arrested, might again get into his truck and drive upon the highway.

3. Automobiles § 2.4— refusal to take breathalyzer test—driving privileges revoked—legality of warrantless arrest immaterial

Petitioner's driving privilege was properly revoked by the Division of Motor Vehicles because of his willful refusal to take a breathalyzer test, and this was so whether or not his warrantless arrest for driving under the influence was legal under G.S. 15A-401.

APPEAL by respondent, North Carolina Division of Motor Vehicles, from *Small, Judge*. Judgment dated 8 November 1977 entered in Superior Court, PITT County. Heard in the Court of Appeals 11 January 1979.

Petitioner's driving privilege was revoked for refusal to take a breathalyzer test. He sought and obtained the hearing provided for in G.S. 20-16.2(d). The hearing officer sustained the revocation. Petitioner then filed the petition in this case under G.S. 20-16.2(e) for hearing de novo in the Superior Court.

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The facts, as disclosed by the evidence presented in the Superior Court, are not in dispute and may be summarized as follows:

On 5 August 1976 Trooper Wright of the North Carolina Highway Patrol was called to the scene of an accident on Rural Paved Road 1537. There, he observed a damaged motorcycle lying on the shoulder of the highway. He was informed by Johnny Speight, who had called the Highway Patrol to the scene, that Speight had seen the petitioner, Robert Morgan Gardner, drive a red Ford pick-up truck across the yellow line on the highway directly in front of the on-coming motorcycle, forcing the motorcyclist into the ditch. When Speight stopped to give assistance to the motorcyclist, he observed petitioner drive his truck into a nearby driveway and proceed to a house.

On receiving this information, Trooper Wright went to the house, which was some 200 to 300 yards from the scene of the accident. There he found the petitioner lying on the porch steps of the house, asleep or passed out. Speight told Wright that petitioner was the man he had seen operating the red truck. Trooper Wright detected a very strong odor of alcohol on petitioner's breath. Petitioner was falling down and staggering and his eyes were very red. In the officer's opinion, the petitioner was very much under the influence of alcohol.

Trooper Wright arrested petitioner for driving under the influence and took him to the Pitt County Jail, where he requested petitioner, in the presence of Trooper Brinson, to take the breathalyzer test. It was stipulated that Trooper Brinson was duly qualified and licensed to administer breathalyzer tests. Trooper Brinson informed petitioner, as required by G.S. 20-16.2(a), both verbally and in writing concerning his rights relative to the breathalyzer test. Petitioner refused to take the test.

At conclusion of the hearing in the Superior Court, the Court entered judgment making findings of fact, including the following:

5. Trooper Wright did not observe the Petitioner operating a motor vehicle and that therefore any offense committed by the Petitioner was committed out of the presence of the officer. There was no evidence offered that

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the Petitioner would not be apprehended unless immediately arrested, nor was there any evidence that the Petitioner might cause physical injury to himself or to others, or damage to property, unless immediately arrested.

6. There was no danger that the Petitioner would not be apprehended unless immediately arrested and there was no reason to believe the Petitioner would cause physical injury to himself or others, or damage to property unless immediately arrested.

7. The Petitioner was not under lawful arrest, but was taken into custody by Trooper Wright.

On its findings of fact, the Court concluded that petitioner was not under lawful arrest when he was requested to submit to the breathalyzer test and, not being under lawful arrest, he had the right to refuse to take the test without becoming subject to the six months revocation of his driving privilege provided by G.S. 20-16.2(c).

From judgment reversing the action of the Division of Motor Vehicles revoking petitioner's driving privilege, respondent appeals.

Attorney General Edmisten by Deputy Attorney General William W. Melvin and Assistant Attorney General Mary I. Murrill for respondent appellant.

No counsel for petitioner appellee.

PARKER, Judge.

Appellant first contends that the court erred in ruling that the officer's warrantless arrest of petitioner under the circumstances disclosed by this record was unlawful. As pertinent to this question, G.S. 15A-401 provides:

G.S. 15A-401. Arrest by law-enforcement officer.—

* * *

(b) Arrest by Officer Without a Warrant.—

* * *

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(2) Offense Out of Presence of Officer.—

An officer may arrest without a warrant any person who the officer has probable cause to believe:

- a. Has committed a felony; or
- b. Has committed a misdemeanor, and:
 1. Will not be apprehended unless immediately arrested, or
 2. May cause physical injury to himself or others, or damage to property unless immediately arrested.

[1] As pointed out in the opinion in *In re Pinyatello*, 36 N.C. App. 542, 245 S.E. 2d 185 (1978), this statute broadened the authority of a law-enforcement officer to make a warrantless arrest for crimes not committed in his presence. Before the effective date of this statute, a law enforcement officer in this State had only limited authority to make a warrantless arrest for a felony not committed in his presence and had no authority to make a warrantless arrest for a misdemeanor not committed in his presence unless he had reasonable ground to believe that the person arrested had committed the misdemeanor in his presence. See Ch. 58, 1955 Session Laws, rewriting former G.S. 15-41, now repealed. Since the effective date of G.S. 15A-401(b)(2), a law enforcement officer is authorized to arrest for a felony not committed in his presence any person who he has probable cause to believe has committed the felony, and he is authorized to arrest for a misdemeanor not committed in his presence any person who he has probable cause to believe has committed the misdemeanor and who he also has probable cause to believe either (1) will not be apprehended unless immediately arrested, or (2) may cause physical injury to himself or others or damage to property unless immediately arrested.

[2] The offense for which the officer arrested the petitioner without a warrant in this case, driving a vehicle on a highway while under the influence of intoxicating liquor in violation of G.S. 20-138(a), is a misdemeanor. G.S. 20-179. It was not committed in the officer's presence. Based on his own observations at the scene of the accident, the arresting officer knew the petitioner to be highly intoxicated at the time the officer first saw him. Based on

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information given him at the scene by a disinterested eye-witness to the accident, the officer had grounds to believe that only a short time previously the petitioner had driven his truck on the highway. Probable cause "may be based upon information given to the officer by another, the source of such information being reasonably reliable." *State v. Roberts*, 276 N.C. 98, 107, 171 S.E. 2d 440, 445 (1970). Thus, the arresting officer had information amply sufficient to provide him with probable cause to believe that petitioner had committed the misdemeanor for which the officer arrested him. The inquiry then becomes whether, as required by G.S. 15A-401(b)(2)b, the officer also had probable cause to believe either (1) that petitioner would not be apprehended unless immediately arrested, or (2) that petitioner might cause physical injury to himself or others or damage to property unless immediately arrested. The trial court found that the officer did not have probable cause to believe that either of these conditions existed and on that basis ruled the arrest illegal.

"Probable cause and 'reasonable ground to believe' are substantially equivalent terms." *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971). "The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." 5 Am. Jur. 2d, Arrest, § 48, p. 740.

In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court or shown by uncontradicted evidence are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal. In the present case there was no conflict in the evidence and the trial court's findings numbers 5, 6, and 7, although contained in the portion of the judgment headed "Findings of Fact," constitute in large measure the trial court's conclusions of law on facts established by uncontradicted evidence. As such, these findings are subject to appellate review.

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We agree with the trial court's finding in this case that "[t]here was no evidence offered that the Petitioner would not be apprehended unless immediately arrested." However, we do not agree with the trial court's conclusion that there was in this case "no reason to believe the Petitioner would cause physical injury to himself or others, or damage to property unless immediately arrested." It was a primary duty of the investigating officer, as a member of the State Highway Patrol, to take all reasonable precautions to protect the safety of persons and property lawfully on the highways. He had been called to the scene of an accident where one vehicle had already been damaged. He had information that petitioner had caused that damage. His own observations confirmed that petitioner was highly intoxicated. Although petitioner was "asleep or passed out" when he first saw him, as investigating officer it was proper for Trooper Wright to awaken the petitioner in order to question him. Once the petitioner had been thus aroused, in our opinion the officer did have reasonable cause to believe, in view of the well known propensity of intoxicated persons to engage in irrational and erratic behavior, that petitioner, if not immediately arrested, might again get into his truck and drive upon the highway. If the petitioner in his drunken condition had done so and an additional accident had resulted, Trooper Wright would have been justly subject to censure for failing to prevent it. In our view, under all of the facts and circumstances which the uncontradicted evidence shows were known by the officer, he had reasonable cause to believe that the petitioner might cause physical injury to himself or others or damage to property unless immediately arrested. If so, the arrest without a warrant was lawful under G.S. 15A-401(b)(2)b.2.

[3] We do not, however, base our decision in this case upon a determination that the arrest was lawful under G.S. 15A-401. This is so because, even had the arrest not been made in compliance with our statute, the petitioner in this case could not willfully refuse to take the breathalyzer test without incurring the six months revocation of his license provided for by G.S. 20-16.2(c). "[A]n arrest may be constitutionally valid and yet 'illegal' under state law." *State v. Eubanks*, 283 N.C. 556, 560, 196 S.E. 2d 706, 708 (1973). As above noted, the arresting officer in the present case had ample information to provide him with probable cause to arrest petitioner for operating a motor vehicle upon a public

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highway while under the influence of intoxicants. Therefore, the arrest was constitutionally valid, and no infringement of petitioner's constitutional rights are here involved. *State v. Eubanks, supra*; *State v. Gwaltney*, 31 N.C. App. 240, 228 S.E. 2d 764 (1976).

G.S. 20-16.2(a), the statute which specifies the circumstances under which a breathalyzer test may be required, directs that the test "*shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor.*" (Emphasis added.) Referring to this language in the statute, Huskins, J., writing the opinion of the Supreme Court in *State v. Eubanks, supra*, said:

It is apparent from the emphasized portion of the statute that administration of the breathalyzer test is not dependent upon the legality of the arrest but hinges solely upon "the . . . law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor."

283 N.C. at 561, 196 S.E. 2d at 709. Consistently with the Supreme Court's interpretation of subsection (a) of the statute, G.S. 20-16.2(d) contains the following:

. . . [T]he scope of such hearing for the purpose of this section shall cover the issues of whether the law-enforcement officer had reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he willfully refused to submit to the test upon the request of the officer. Whether the person was informed of his rights under the provisions of G.S. 20-16.(a)(1), (2), (3), (4) shall be an issue.

It is significant that the subsection makes no reference to any question concerning the *legality* of the arrest as coming within the scope of the inquiry.

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State v. Eubanks, supra, involved an appeal from a conviction for operating a motor vehicle on a public street or highway while under the influence of intoxicating liquor, and the opinion of the Court was concerned with the admissibility of evidence of the results of a breathalyzer test. In this connection, the Court said:

We hold that nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant.

283 N.C. at 560, 196 S.E. 2d at 709.

We are, of course, advertent to G.S. 15A-974(2), which became effective after the opinion in *State v. Eubanks, supra*, was written. That statute provides that upon timely motion, evidence must be suppressed if it is obtained as a result of a substantial violation of the provisions of G.S. Ch. 15A. In the present case we are not concerned with the admissibility or suppression of evidence. We are concerned only with whether the petitioner's driving privilege was properly revoked by the Division of Motor Vehicles under G.S. 20-16.2 because of his willful refusal to take a breathalyzer test. Petitioner could have avoided revocation of his license simply by taking the breathalyzer test. Only then would there have been any evidence to suppress. If petitioner had taken the test and had been of the opinion that thereby evidence against him had been obtained as result of an illegal arrest made in a manner which constituted a substantial violation of G.S. Ch. 15A, he could have preserved his right to raise that question by making a timely motion to suppress in any subsequent trial of the criminal charge against him. However, the question of the legality of his arrest, as distinguished from its constitutional validity, was simply not relevant to any issue presented in this proceeding, which is concerned solely with whether his driver's license was properly revoked for willful refusal to take the breathalyzer test.

We hold that petitioner's driving privilege was properly revoked by the Division of Motor Vehicles because of his willful refusal to take the test and that this is so whether or not his warrantless arrest was legal under G.S. 15A-401.

The judgment of the Superior Court is

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Reversed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. WILSON REECE ATKINSON

No. 7821SC893

(Filed 6 February 1979)

1. Criminal Law § 75.15— intoxicated defendant—statements voluntary

Evidence was sufficient to support the trial court's findings that defendant had been advised of his *Miranda* rights, that he stated to an officer that he understood his rights, did not want an attorney, and was willing to talk to the officer, and the fact that defendant was intoxicated did not negate the court's conclusion that defendant's statements were freely, understandingly and voluntarily made.

2. Criminal Law § 86.2— impeachment of defendant—prior convictions—presumption of validity

The use of convictions which are constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335, for purposes of impeaching defendant's credibility deprives him of due process of law; however, convictions are presumed valid, and the burden of proof is on the defendant to prove his inability to employ counsel at the time of the conviction which he contends was invalid.

3. Criminal Law § 86.2— impeachment of defendant—prior unrelated offenses

In a prosecution for driving under the influence and assaulting a law enforcement officer engaged in the performance of his duties, the trial court did not err in allowing the State to use defendant's prior motor vehicle convictions for impeachment purposes, since a defendant who testifies is subject to cross-examination concerning prior convictions including unrelated violations of motor vehicle laws.

4. Criminal Law § 86.2— other offenses by defendant—admissibility to show lack of trustworthiness

Defendant's prior convictions over the past several years were admissible as tending to show his lack of trustworthiness.

5. Automobiles § 127.1— drunk driving—defendant as driver—sufficiency of evidence

In a prosecution for driving under the influence, evidence was sufficient to show that defendant was driving a car at the time in question where it tended to show that defendant was seen leaving his car which was located partially on the road and partially on the curb; when an officer arrived at the car, the motor was still running, and defendant told the officer that he had run his car off of the roadway; when a second officer arrived, defendant again stated that

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he had run off the road; and still later, defendant was asked if he had been operating a motor vehicle and he stated that he had.

6. Automobiles § 129; Criminal Law § 113.3— defendant's intoxication when statements made—no request for instruction

In a prosecution for driving under the influence where there was evidence that defendant had made statements that he was the driver of the car in question, and that he was intoxicated at the time he did so, defendant was not entitled, absent a request, to a special instruction informing the jury that they must consider the condition of defendant at the time he made the statements in determining the weight and credibility to be given those statements.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 24 May 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals sitting in Winston-Salem 6 December 1978.

The defendant was charged with the misdemeanors of operating a motor vehicle while under the influence of an intoxicating liquor and assaulting a law enforcement officer engaged in the performance of his duties. Upon his pleas of not guilty to both charges, the jury found him guilty of operating a motor vehicle while the amount of alcohol in his blood was .10 percent or more by weight and guilty as charged of assault on a law enforcement officer engaged in the performance of his duties. From judgment sentencing him to imprisonment for a term of six months and a term of eighteen to twenty-four months for the respective crimes, the defendant appealed.

The State's evidence tended to show that Officer Jan Culler of the Winston-Salem Police Department was dispatched to answer a call concerning a stranded motorist on 2 March 1978. As she approached her destination, she observed the defendant leave a 1973 Chevrolet that was located partially on the highway and partially on the curb. After leaving the car, the defendant walked across the median towards a telephone. When she reached the defendant's car, he returned to talk to her. The motor of the defendant's car was still running, and he told the officer that he had run his car off the roadway. As the two talked, Officer Culler detected a strong odor of alcohol about the defendant and noticed that he was having difficulty standing. She asked the defendant to take three performance tests, but he either would not or could not perform the tests. The defendant was then placed under arrest for driving under the influence.

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After he was arrested, the defendant became belligerent and threatened the officer. Officer Culler then radioed for assistance. When a second officer arrived at the scene, he found that Officer Culler had already handcuffed the defendant and placed him in the backseat of her patrol car. The second officer, Officer D. R. Wilson, then advised the defendant of his Miranda rights. The defendant waived those rights and was asked what happened. The defendant responded that he had run off the side of the road.

The defendant was transported to the police station where he was again informed of his rights. Officer Culler asked the defendant if he had been operating a vehicle and he stated that he had. Thereafter, the defendant incorrectly identified the highway he had been on, the city he was in and the date.

After being questioned, the defendant was taken to Officer Balinda Gale Ingram, a licensed breathalyzer operator. After being advised of his rights in connection with the breathalyzer test, the defendant submitted to the test. The results of the breathalyzer test indicated that the defendant had .19 percent alcohol to blood by weight.

After the breathalyzer test had been completed, Officer Wilson took the defendant to a holding cell. As Officer Wilson attempted to close the door to the cell, the defendant grabbed him around the throat and began choking him. Officer Wilson was able to free himself from the defendant's grip and subdued the defendant.

The defendant offered evidence tending to show that he and two other men left work in Raleigh on 2 March 1978 and drove to a liquor store where they bought a fifth of liquor. As the defendant drove toward Winston-Salem, the three began to drink the liquor. It soon began to snow, and the defendant stopped to allow one of the other men to drive. When they reached Winston-Salem, the driver stopped and let one of the passengers out of the car and then continued driving with the defendant as a passenger. As they proceeded, the car slid on the snow and became stuck. The driver told the defendant that he had to leave, and the defendant indicated he would remain with the car until a wrecker could pull it back onto the highway.

The defendant testified that, after the driver left, he went to a telephone to call a wrecker. When he returned to his car, Of-

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ficer Culler was there. She handcuffed him and placed him in the backseat of her patrol car without giving him any type of performance test. When Officer Wilson arrived, he did not advise the defendant of his rights, and the defendant did not make any statement. The defendant further testified that he and Officer Wilson exchanged a few hostile words at the police station. After having made certain comments to Officer Wilson, the defendant could not remember anything else that occurred at the police station.

Additional facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, V. Edward Jennings, Jr. and David R. Tanis, for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the trial court's determination that certain statements made by the defendant to the effect that he was driving a car were admissible in evidence. The defendant contends that his intoxication prevented him from voluntarily waiving his Miranda rights or making a meaningful confession. Therefore, the defendant contends that the trial court erred in its ruling upon the admissibility of his statements.

When the State offers a defendant's confession that he has committed the crime charged or some essential element thereof, and the defendant objects, the trial court must conduct a voir dire hearing to determine its admissibility. The trial court must hear the evidence, observe the demeanor of the witnesses and resolve any questions by appropriate findings of fact. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). If the trial court's findings are supported by competent evidence, they are deemed to be conclusive on appeal. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

In the present case, the trial court conducted such a hearing and found that the defendant had been advised of his Miranda rights. The trial court further found that the defendant stated to

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the officer that he understood his rights, did not want an attorney and was willing to talk to the officer. These findings are supported by competent evidence and must be considered conclusive.

From these findings, the trial court concluded that the defendant's statements were freely, understandingly and voluntarily made. The fact that the defendant may well have been intoxicated does not negate this conclusion. An admission by an intoxicated defendant is admissible unless the defendant is so intoxicated as to be unconscious of the meaning of his words. *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, cert. denied, 384 U.S. 1013, 16 L.Ed. 2d 1032, 86 S.Ct. 1983 (1966). The trial court did not find that the defendant was unconscious of the meaning of his words. We therefore find no error in the trial court's conclusion that the defendant's statements were freely, understandingly and voluntarily made and were admissible in evidence.

[2] The defendant next contends that the trial court erred in allowing the District Attorney to impeach him by questioning him concerning his prior convictions without first ascertaining whether the defendant was represented by counsel at the time of those prior convictions. As the defendant correctly points out, the use of convictions which are constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963) for purposes of impeaching the defendant's credibility deprives him of due process of law. *Loper v. Beto*, 405 U.S. 473, 31 L.Ed. 2d 374, 92 S.Ct. 1014 (1972). The use of prior void convictions for purposes of impeachment of a criminal defendant deprives him of due process where their use might well have influenced the outcome of the case. However, convictions are presumed valid, and the burden of proof is on the defendant to prove his inability to employ counsel at the time of the conviction which he contends was invalid. *State v. Vincent*, 35 N.C. App. 369, 241 S.E. 2d 390 (1978); *State v. Williams*, 34 N.C. App. 744, 239 S.E. 2d 620 (1977); *State v. Buckner*, 34 N.C. App. 447, 238 S.E. 2d 635 (1977). The record before us on appeal reveals no evidence of any type tending to show that the defendant was not represented by counsel at any of his prior convictions. Therefore, the defendant failed to meet his burden of proof and his assignment of error is overruled.

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[3] The defendant next contends that the trial court erred in allowing the State to use his prior motor vehicle convictions for impeachment purposes. When a defendant takes the stand and testifies, he is subject to cross-examination concerning prior convictions including unrelated violations of motor vehicle laws. *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967); *State v. Long*, 20 N.C. App. 91, 200 S.E. 2d 825 (1973). The determination as to whether such an examination is unfair rests largely in the discretion of the trial court. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970). As nothing in the record indicates that the trial court abused its discretion in this regard, the defendant's assignment of error is overruled.

[4] The defendant next contends that the trial court erred in allowing the State to use certain prior convictions for impeachment purposes due to their remoteness in time. Prior convictions are relevant to show the defendant's lack of credibility and trustworthiness as a witness. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). A series of convictions which continue well into the past may be relevant to show a defendant's repeated and abiding contempt for the law and, thereby, his lack of trustworthiness. *State v. Ross*, 295 N.C. 488, 493, 246 S.E. 2d 780, 784 (1978). Therefore, the defendant's prior convictions over the past several years were admissible as tending to show his lack of trustworthiness.

[5] The defendant also assigns as error the failure of the trial court to grant his motions to dismiss at the close of the State's evidence and at the close of all the evidence. He contends that the evidence was insufficient to show that he was driving a car at the time in question. We do not agree.

In ruling upon a defendant's motion to dismiss for insufficiency of evidence, the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference deducible therefrom. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). The evidence before the trial court, when considered in such light, reveals that the defendant was seen leaving his car. When an officer arrived at the car, the motor was still running, and the defendant told the officer that he had run his car off of the roadway. When a second officer arrived,

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the defendant again stated that he had run off the road. Still later, the defendant was asked if he had been operating a motor vehicle and stated that he had. This evidence was more than sufficient to support a reasonable inference that the defendant had been driving. The motions were properly denied, and this assignment of error is overruled.

[6] Finally, the defendant assigns as error the failure of the trial court to sufficiently instruct the jury concerning the weight and effect of the defendant's statements that he was the driver of the car. As there was evidence tending to indicate that the defendant was intoxicated, he contends that he was entitled to a special instruction informing the jury that they must consider the condition of the defendant at the time he made the statements in determining the weight and credibility to be given those statements.

It is clear that the trial court is required to declare and explain the law arising on the evidence. G.S. 15A-1232. This would require that an instruction be given on every substantive feature of the case, even in the absence of a request for such an instruction. See *State v. Hornbuckle*, 265 N.C. 312, 144 S.E. 2d 12 (1965). However, the trial court need not instruct the jury with any greater particularity than is necessary to enable the jury to apply the law to the substantive features of the case arising on the evidence when, as here, the defendant makes no request for additional instructions. *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965); *State v. Patton*, 18 N.C. App. 266, 196 S.E. 2d 560 (1973).

A substantive feature of a case is any component thereof which is essential to the resolution of the facts in issue. Evidence which does not relate to the elements of the crime itself or the defendant's criminal responsibility therefore are subordinate features of the case. *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 45 (1976). The weight to be accorded the defendant's confessions concerns a subordinate feature of the case and is not a substantive feature thereof which requires a specific instruction in the absence of a special request. *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 45 (1976); *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976); *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973). *But cf.*

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State v. Isom, 243 N.C. 164, 90 S.E. 2d 237 (1955) (request by jury for instruction regarding weight to be given confession of a drunk). This assignment of error is without merit and is overruled.

The defendant received a fair trial free from prejudicial error, and we find

No error.

Judges CLARK and WEBB concur.

MARY CHARLOTTE NELME GRIFFIN, BENNETT M. EDWARDS, AND JAMES A. HARDISON, JR., ADMINISTRATIVE TRUSTEES UNDER ARTICLE XXII OF THE WILL OF GENERAL WILLIAM A. SMITH, AND AMERICAN BANK AND TRUST COMPANY, TRUSTEE UNDER ARTICLE XXII OF THE WILL OF GENERAL WILLIAM A. SMITH v. THE RIGHT REVEREND THOMAS A. FRASER, JOSEPH B. CHESHIRE, JR., A. L. PURRINGTON, AND HENRY D. HAYWOOD, TRUSTEES OF THE EPISCOPAL DIOCESE OF NORTH CAROLINA; AND RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA

No. 7820SC244

(Filed 6 February 1979)

1. Declaratory Judgment Act § 4.7— interpretation of Internal Revenue Code— application to testamentary trusts—no justiciable controversy

There was no controversy between the parties justiciable under the Declaratory Judgment Act where plaintiffs, the administrative trustees of a testamentary trust, sought to have provisions of the Internal Revenue Code interpreted by the trial court so as to render the confiscatory tax on accumulations by private foundations applicable to income of a second testamentary trust paid to and held by the Episcopal Diocese of North Carolina, and then sought to use such ruling to create a controversy between the parties as to whether the Diocese should pay such funds to plaintiff administrative trustees to be spent for the benefit of a school set up under the first trust.

2. Taxation § 28.1— Internal Revenue Code—confiscatory tax on accumulations by private foundations—inapplicability to Episcopal Diocese

The trial court erred in concluding that income of a testamentary trust paid to the Episcopal Diocese of North Carolina was subject to the confiscatory tax imposed by provisions of the Internal Revenue Code on accumulations by private foundations.

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3. Trusts § 8— testamentary charitable trusts—pour-over provisions—right to income

Cause is remanded for an evidentiary hearing and determination by the trial court as to the effect of pour-over provisions of two testamentary charitable trusts and the rights of beneficiaries of those trusts to the income thereof.

APPEAL by defendant Diocese from *McConnell, Judge*. Judgment entered 8 November 1977 in Superior Court, ANSON County. Heard in the Court of Appeals 10 January 1979.

H. P. Taylor, Jr., for the plaintiffs.

Craighill, Rendleman, Clarkson, Ingle & Blythe, by J. B. Craighill and William B. Webb, Jr., for the defendant Diocese.

Attorney General Edmisten, by Associate Attorney Marilyn R. Rich, for the State.

MARTIN (Robert M.), Judge.

General William A. Smith died testate 18 April 1934, providing in his holographic will (under Items XXI and XXII of that instrument) for the creation of several trust funds, three of which were to accumulate for 99 years before disbursement of any of the corpus or increment thereon. Items XXI and XXII are set out below:

ITEM XXI. It is my desire to aid the church and education with a part of the worldly goods God has graciously permitted me to accumulate. To this end I direct my executor to place in the Bank of Wadesboro for the Protestant Episcopal Church of the Diocese of North Carolina—should this Diocese be divided, then the fund created by this item is to go to that Diocese which includes the village of Ansonville—the sum of twenty-five thousand dollars value in stocks of Domestic Corporations—The Bank of Wadesboro will treat this as a special trust. The said Bank is empowered to change these stocks in its discretion, to invest the increment of this fund in good, safe, dividend paying stocks, bonds, choses in action or realty bearing in mind the importance of safe-guarding this fund, while increasing it for the following purpose. This fund is committed to said Bank of Wadesboro and its successors for the period of ninety-nine years, it and its accumulations

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to be paid to the Diocese of North Carolina at the expiration of said 99 years. My purpose is to give said Bank the same power in the administration of this fund as I now possess. The Bank of Wadesboro shall receive five per cent of the increment till the fund amounts to Fifty Thousand dollars, four per cent of the increment till it increases to Seventy-five Thousand dollars, three and half per cent to One Hundred Thousand dollars. Afterwards three per cent of the increment as compensation for wisely, discreetly and honestly investing and reinvesting this fund. No compensation shall the Bank of Wadesboro or its successors receive for handing over the amount of this fund to the Diocese of North Carolina.

Should said Bank decline this trust, then it is to be offered to the First National Bank of Wadesboro. Then to the American Trust Company, then to Wachovia Bank of Winston-Salem. I further instruct my executor to place a like sum in stocks to the value of Twenty-five Thousand dollars approximately and approximately the amount placed in the Bank of Wadesboro into the American Trust Company of Charlotte, N.C. for a like period of 99 years to be held by them in trust with like power of investment and reinvestment, etc., and compensation as give above to the Bank of Wadesboro. The Bank of Wadesboro and American Trust Company each for itself are instructed and directed to make annual report to the Diocese at its Annual Conventions the amount of the principal and increment of this fund. Every three years said reports shall be certified to by an accredited auditor, when desired by the Diocese Convention of N.C.

I also direct my executor to place in the Bank of Anson, Ansonville, N.C. Five Thousand dollars in good stocks or cash in said Bank of Anson with the same and like powers changing said stock in its discretion, in investing and reinvesting, compensation and reports to the Annual Convention of the Diocese of North Carolina—and at the close of 99 year period to pay the total amount of this fund to said Diocese. Should either Bank decline this trust and trusteeship, then I direct my Executor to offer it to the Bank of Wachovia, in Winston-Salem. This fund when paid to the Diocese of North Carolina is to be used and administered by said Diocese as directed in item XXII of this my will.

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ITEM XXII. I give to the Diocese of North Carolina as named in item XXI of this will, the remainder of my estate both real and personal, to be used primarily for the benefit of my race—for purposes as set down below.

I request and direct the Convention of North Carolina at its first session after I fall on sleep to select and appoint for a term of three years, three honorable, capable and discreet members of the Protestant Episcopal Church, residing in Anson County to administer this fund: Erecting buildings on land in or near the village of Ansonville to an amount not exceeding in cost Fifty Thousand dollars and setting apart the balance or remainder of the fund given by this item as a permanent fund using only the increment. These three trustees and their successors to be appointed tri-annually and they and their successors are instructed to use the fund created by this item and by item XXI in schools for both sexes of the white race—Educational and Industrial schools, Hospitals, gymnasiums and other purposes in their discretion—mainly and principally I have in mind training youth trades and domestic arts by which they may be enabled to earn their own living and become efficient members of our County and Commonwealth.

This fund and that created by item XXI when it comes into possession of the Diocese shall be known as the "Gen. W. A. Smith Trust" or other designation the Convention may elect to name it, shall be administered by the three trustees and their successors according to their judgment and discretion, limited only to Ansonville and its near vicinity. They shall submit an annual report to the Convention of the Diocese of North Carolina, setting forth in full, the amount received and disbursed, the purpose of disbursement, their acts during each year and reasons for said acts, accompanied by an authorized auditor's report.

Plaintiffs, administrative trustees of the fund created in Item XXII of General Smith's will, brought this civil action to compel the ultimate payment to them as trustees of certain funds now being held and accumulated by the Episcopal Diocese of North Carolina. The administrative trustees, or their predecessors in of-

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fice, have earlier attempted to modify the trusts to allow the immediate payout of the trust earnings for the benefit of the school in Ansonville created under Item XXII, citing present need and contending that the ninety-nine year accumulations were against public policy. These contentions were rejected by our Supreme Court in *Penick v. Bank*, 218 N.C. 686, 12 S.E. 2d 253 (1940), and the funds continued to accumulate until another action was brought in Wake County in 1971 to allow the trusts so accumulating income to disburse their incomes annually or more frequently so as to avoid being subject to certain confiscatory taxes imposed on private foundations by the Tax Reform Act of 1969. By consent judgment entered 3 October 1972, Judge Canaday allowed the amendment of the trust instruments so that the trusts could comply with the changed provision of the federal tax laws, and it was ordered that the increment from the three funds set up by Item XXI be paid to the Episcopal Diocese of North Carolina. The Diocese has since held and accumulated these funds. (The Diocese resigned from trusteeship of all of the various trusts in 1942, feeling that their administration would be better left to persons or organizations who made such activity their profession.) Plaintiffs in this action sought to have the Internal Revenue Code interpreted by the trial court so as to render the confiscatory tax on accumulations by private foundations applicable to the funds paid to and held by the Diocese, and therefore necessitating that the Diocese pay over these funds so that they could be spent by the administrative trustees for the benefit of the school set up under Item XXII of General Smith's will. The Diocese answered, denying the allegations of the administrative trustees and praying for construction of Items XXI and XXII of the will. The Attorney General, party to the action under G.S. 36-23.2 which makes him legal representative of the public interest, answered perfunctorily, admitting conflicting and contradictory allegations. The trial judge awarded plaintiffs the relief sought, basing his ruling upon the interpretation of the pertinent Internal Revenue Code sections urged by plaintiffs. From this order, the defendant Diocese appeals. We reverse and remand with instructions.

[1] This action was brought by plaintiffs under the Declaratory Judgment Act (N.C. G.S. 1-253 *et seq.*) seeking interpretations of §§ 170, 509, 4942 and 4947 of the Internal Revenue Code (1954, as amended). Plaintiffs contended, and the trial judge ruled, that the

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income paid out of the three trusts of Item XXI to the Diocese pursuant to Judge Canaday's order of 1971 amending the trust instrument was still subject to the confiscatory tax imposed by § 4942 on accumulations by private foundations, and that the exemption of churches from private foundation status (under § 509 (a)(1) and § 170(b)(1)(a)) was not applicable to the instant situation. Plaintiffs have brought forward no authority in support of their contentions, and the trial judge did not cite any in his order so ruling. We have been unable to locate any such authority either, and are of the opinion that the complaint should have been dismissed for lack of a justiciable controversy between the parties. The Internal Revenue Service had issued an advisory letter to the corporate fiduciaries of the trust funds indicating that their annual disbursements of trust income to the Diocese was a qualified distribution that relieved the trusts from the § 4942 tax on private foundations' accumulations. No challenges heretofore have been made to the propriety of the Diocese's holding and accumulating the funds.

It has long been settled that there must exist some justiciable controversy between parties in a declaratory judgment action for the court to entertain jurisdiction of it under G.S. 1-253. "Jurisdiction under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, may be invoked 'only in a case in which there is an actual or real existing controversy between adverse interests in the matter in dispute.' *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 [(1949)], and cases cited." *Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E. 2d 413, 416 (1957). There must appear that "a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under . . . a statute . . . exists between or among the parties," *Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1932). It is a "jurisdictional necessity" that a genuine controversy between parties having conflicting interests exist. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450 (1942).

What plaintiffs apparently sought by their complaint was a ruling creating a new interpretation of the Internal Revenue Code sections cited above, and then to use such ruling as creating a controversy between the parties to this action justifying the granting of relief. We are of the opinion that "bootstrapping" of this type will not suffice for the jurisdictional prerequisites of a declaratory judgment action. Although G.S. 1-254 gives the court

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jurisdiction to construe a statute, the request for construction must come from parties whose rights, status or other legal relations are affected by that statute. Plaintiffs have not pled or shown how *their* rights, etc., are affected by the Internal Revenue Code provisions for which they sought construction. Nor have the plaintiff administrative trustees under Item XXII of the will pled their relations with the trusts under Item XXI of the will so as to confer jurisdiction under G.S. 1-255.

What plaintiffs should have done, and what defendant did do, was to pray for construction of Items XXI and XXII so as to determine the rights of the various parties as beneficiaries under the trusts. The trial court did not consider questions of construction, as they were not apparently argued below. Since a prayer for construction was made, and since construction of the two items of General Smith's will is necessary to a proper determination of the parties' rights, we remand with instructions to the trial judge to hear evidence and arguments and make findings of fact and conclusions of law pertinent to the construction of Items XXI and XXII.

[2] Initially, we would note the inappropriateness of the State's trial courts as a forum for construction of federal taxation statutes. Although exclusive jurisdiction of federal tax matters is not vested in the federal courts, leaving the several state courts with concurrent jurisdiction over such questions, federal courts and the Internal Revenue Service have consistently ignored state court rulings on federal tax questions where the state rulings threatened to impair the uniformity of the national tax scheme. (We also note that the United States was not joined as a party to the action for construction of the *Code* sections, creating another defect in the declaratory judgment status of the proceeding under G.S. 1-260.) Questions of federal taxation are generally matters of substantial complexity, and the federal courts and the Internal Revenue Service have well established procedures for determining tax controversies and construing the meaning of federal tax statutes. In the present case, as the trial court's jurisdiction over the action was defective, and as all necessary parties were not joined, the ruling as to the taxable status of certain funds in the hands of the Diocese would be a nullity; however, the interpretation of the several Internal Revenue Code provisions listed *supra*

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made by the trial court which purports to render the Diocese into a private foundation is clearly erroneous and is reversed.

[3] It is not necessary to consider the questions of tax law raised by plaintiffs to settle the dispute between them and the Diocese. The Tax Reform Act of 1969 manifestly sought to prevent private charitable foundations from accumulating their incomes for no better reason than the whim of the foundations' trustors, and placed certain confiscatory taxes upon non-qualifying accumulations in an effort to stimulate the flow of income out of the foundations and into the economy via the religious, charitable, or educational purposes for which the foundations were created to ultimately benefit. The consent judgment of 3 October 1972 sought to, was intended to, and did bring the three trusts of Item XXI into compliance with the changes in the tax law. It did not, however, determine the question of who should receive what portions of the income to be paid out and, indeed, it could not have, as the administrative trustees of the trust created by Item XXII (plaintiffs to this action and potential beneficiaries of some or all of the Item XXI trusts) were not parties to that judgment. To comply with the current federal tax law, the income from the Item XXI trusts must pass to the hands of the ultimate beneficiaries free of trust and capable of being immediately spent for the purposes for which the trusts were created.

There are certain ambiguities in the will requiring construction. Defendants, in their answer, prayed for a construction of the two items (Items XXI and XXII) of the will in question. Although the trial court's order implicitly construed these items, the record is devoid of evidence, findings of fact or conclusions of law dealing with construction or interpretation of the two contested items. Item XXI announces the testator's intention to aid the church and education. Three trust funds are then set up; two of which arguably would ultimately be paid to the Episcopal Diocese of North Carolina and a third which is explicitly created for the benefit of the school and trust created under Item XXII. Whether the pour-over into Item XXII provided for in paragraph (3) of Item XXI is limited in effect only to that same paragraph or applies to the entire item, and whether the reference in Item XXII to "that [fund] created in Item XXI" includes only paragraph (3) or all of the paragraphs of Item XXI, and a determination of the testator's ultimate intent are all questions of which resolution

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must be had before any determination of the rights and interests of the various parties may be made.

The State contends in its brief that the issue of construction (with reference to the pour-over provisions of Items XXI and XXII) was squarely before the trial court and was properly resolved in plaintiffs' favor. While we express no opinion as to the ultimate construction of these two items, we are of the opinion that the trial judge's findings of fact from the evidence and his conclusions of law were insufficient to support his order, necessitating that we remand for further hearing and findings.

In summary, the portions of this declaratory judgment action seeking construction of Internal Revenue Code §§ 170, 509, 4942, and 4947 are remanded to the trial court for entry of dismissal. The trial judge's order construing the above-cited code provisions imposing taxable private foundation status upon the Diocese, and thereby requiring payment of the accumulated income from the Diocese to the administrative trustees for immediate use is vacated. The action is remanded to determine the issues of construction raised by the Diocese in its answer and discussed above, so that the trial court may make findings of fact and conclusions of law with reference to the testator's (General William A. Smith's) intent and construing his will, such findings to be consonant with whatever competent and relevant evidence may be adduced in support or derogation of the several parties' contentions. Upon these findings and conclusions the trial judge may enter orders directing the disposition of the funds held by the Diocese derived from the income of the trusts created under Item XXI of General Smith's will and grant other relief as necessary, not inconsistent with this opinion.

Reversed and remanded.

Judges MITCHELL and ERWIN concur.

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TROY'S STEREO CENTER, INC. v. CHARLES B. HODSON

No. 7814SC219

(Filed 6 February 1979)

1. Limitation of Actions § 4.2— statute of limitations for legal malpractice—no extension under G.S. 1-15(b)

G.S. 1-15(b) did not extend the statute of limitations for an action for legal malpractice where the action was already barred when that statute became effective.

2. Limitation of Actions § 4.2; Attorneys at Law § 5.1— statute of limitations for legal malpractice

The statute of limitations for an action for legal malpractice in failing to file a suit until after it was barred by the statute of limitations began on the last date on which defendant attorney could have successfully brought the prior suit for the plaintiff, not the date on which the statute of limitations was affirmatively pleaded in the prior action or the date on which such action was dismissed because of the statute of limitations.

3. Estoppel § 4— equitable estoppel to assert statute of limitations

The doctrine of equitable estoppel may, in a proper case, be invoked to prevent a defendant from relying on the statute of limitations.

4. Estoppel § 4.2— equitable estoppel to assert statute of limitations—jury question

In this action for legal malpractice in failing to file a suit on behalf of plaintiff against a gas company until after the suit was barred by the statute of limitations, there was a genuine issue of material fact for determination as to whether defendant attorney was barred from asserting a defense of the statute of limitations by the doctrine of equitable estoppel where plaintiff alleged that defendant had an affirmative duty to disclose to the plaintiff his own negligence in the handling of the case and that his failure to do so in the four and one half years subsequent to his negligent act barred him from asserting the statute of limitations, and defendant argued that plaintiff prevented him from filing a reply to the gas company's answer and motion for summary judgment and from appealing summary judgment entered for the gas company, that plaintiff was guilty of laches in failing to verify the complaint in the action against the gas company until after the statute of limitations had run, and that he made no inducements to the plaintiff and was never paid any fee for services rendered.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 5 December 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 January 1979.

This is an action for legal malpractice, brought in the Superior Court of Durham County, in which the plaintiff alleged

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negligence by the defendant, Charles B. Hodson, an attorney. Plaintiff is the successor in interest to a partnership formerly existing between John Richmond and John Troy and known as Troy's Hi Fi Stereo Center.

On 14 January 1964, the building in which Troy's Hi Fi Stereo Center was doing business burned down as the result of a fire allegedly caused by the negligence of the Public Service Company of North Carolina, Inc. Plaintiff has alleged that the fire caused total destruction of its stock and inventory and an interruption of its business and that it was damaged in the total amount of \$26,865.27. The negligent activities on the part of Public Service Company of North Carolina, Inc., if any, were alleged to have occurred in November and December of 1963, with the last act or omission occurring on or about 9 December 1963.

Sometime in 1964, and subsequent to the fire, Troy's Hi Fi Stereo Center retained Charles B. Hodson as its attorney to pursue its claim against Public Service Company. The record discloses that unsuccessful negotiations took place thereafter and that on 11 January 1966 defendant made written demand on Public Service Company on behalf of plaintiff. On 18 May 1966 defendant, in a letter to the father of one of the partners, indicated his intention to file suit. Defendant, in his affidavit submitted in support of his motion for summary judgment, stated that he prepared a complaint on behalf of plaintiff's predecessors against the Public Service Company in the last few days of November, 1966. He further stated that numerous attempts by his office to contact Richmond and Troy to verify the complaint were unsuccessful and that he has at no time received remuneration for his services. Richmond and Troy did verify the complaint on 13 January 1967.

On 13 January 1967, Hodson filed the complaint in the lawsuit entitled "*John Troy and John Richmond v. Public Service Company of North Carolina, Inc.*" (Superior Court of Durham County, file No. 67-CVS-92) and caused summons to be issued that date against Public Service Company.

The record discloses no further activity until 12 March 1971, when James G. Billings, an attorney with the law firm of Powe, Porter & Alphin of Durham, filed an amended complaint on behalf

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of the plaintiff. Subsequent correspondence took place between Billings and the defendant, and on 11 May 1971 defendant was allowed to withdraw as counsel for plaintiff. In a letter to Billings from defendant dated 8 April 1971, defendant stated, "In regard to my failure to diligently prosecute the case, as stated to you before, my failure came about as a result of your present clients promising to pay their attorney's fees, but never coming through with any cash."

Public Service Company filed its answer on 13 May 1971, after defendant had withdrawn as counsel for the plaintiff, and raised North Carolina Statute of Limitations, G.S. 1-52, as an affirmative defense. On 27 September 1971, Public Service Company filed a motion for summary judgment which was granted by Judge McKinnon on 8 November 1971, on the basis of the statute of limitations defense raised by Public Service Company.

The present action was instituted by plaintiff on 15 February 1972, alleging legal malpractice by defendant in allowing the statute of limitations to run against Public Service Company. On 27 April 1972, defendant filed an answer denying the allegations of the complaint and setting forth six defenses. On 7 November 1977, a motion was filed seeking leave to amend his answer by raising the statute of limitations, G.S. 1-52, as an affirmative defense. The motion was allowed by Judge Bailey on 8 November 1977, and plaintiff filed a reply to the amended answer on 5 December 1977.

Also, on 7 November 1977, defendant moved for summary judgment on the grounds that the three year statute of limitations barred the plaintiff's action.

On 5 December 1977 Judge Bailey allowed the motion for summary judgment concluding that:

There is no genuine issue as to any material and ultimate fact, and that it appears upon the face of the record that the cause of action complained of accrued more than three years prior to the institution of the action, and that as a matter of law this action is barred by the three-year Statute of Limitations, and that Plaintiff is not entitled to recover of the Defendant.

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Judge Bailey's judgment dismissed the action against defendant with prejudice.

From the order granting defendant's motion for summary judgment and dismissing the action, the plaintiff appeals.

Powe, Porter, Alphin & Whichard, by Charles R. Holton for plaintiff appellant.

Vann & Vann, by Arthur Vann and Whedbee and Riddick, by Rosbon D. B. Whedbee for defendant appellee.

CARLTON, Judge.

The sole question presented by this appeal is whether the record discloses the plaintiff's claim is barred by the running of the statute of limitations. If so, defendant was entitled to judgment as a matter of law, and summary judgment under Rule 56, N.C. Rules of Civil Procedure was appropriate. We hold that the motion was improperly allowed and the trial court's judgment must be reversed.

In its brief, plaintiff appellant advances three arguments for our consideration. We reject the first two, but agree with the last.

[1] Plaintiff first argues that since this action was commenced on 15 February 1972, G.S. 1-15(b) should control instead of the three year statute of limitations relied on by the trial court, G.S. 1-52.

G.S. 1-15(b), enacted by the 1971 General Assembly, provided at that time as follows:

Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury *was discovered by the claimant, or ought reasonably to have been discovered by him*, whichever event first occurs; provided that in such cases the period shall not exceed ten years from the last act of the

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defendant giving rise to the claim for relief. (Emphasis added.)

Plaintiff argues that this subsection was effective on 15 February 1972, the date this action was commenced. It further argues that the date on which it should have discovered the damage to its chose in action was the date on which Judge McKinnon dismissed the prior action, 8 November 1971. Alternatively, plaintiff argues that the date should be that when Public Service Company first affirmatively pleaded the statute of limitations defense, 13 May 1971. Using either of these dates, plaintiff's action would obviously have been filed well within the limitation of G.S. 1-15(b).

On oral argument, plaintiff conceded that G.S. 1-15(b) is not applicable to this action. We agree. While the General Assembly may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute, an action already barred by a statute of limitations may not be revived by an act of the legislature. *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E. 2d 263 (1949). The statute of limitations tolled for plaintiff's predecessor on 9 December 1966, three years after the alleged first act or omission of Public Service Company. It is unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. That was the prevailing North Carolina law at the time plaintiff's present action was instituted. *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965).

[2] The plaintiff's second argument involves a strained interpretation of the decision of this Court in *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971). Plaintiff's argument here essentially is that since the statute of limitations is a procedural defense which must be affirmatively pleaded, in contrast to defenses which render an action void *ab initio*, then the statute of limitations does not accrue until the defense has been affirmatively pleaded. In the instant case, Public Service Company pleaded the statute of limitations defense on 13 May 1971 and plaintiff argues that this is the date the cause of action against defendant accrued.

In *Brantley*, *supra*, plaintiff brought a malpractice action against his attorneys for alleged negligence in filing defective

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summons on his behalf. The action was instituted more than four years after the defective summons was filed. Plaintiff argued that his claim against the attorneys did not accrue until the courts later determined that his original action was barred by virtue of the defective summons. This Court held that the action accrued at the time of the filing of the defective complaint, reiterating the rule that it is unimportant that the actual or substantial damage does not occur until later if the whole injury results from the original act. That case is clearly analogous to the case at bar in that the alleged original wrongful omission of the defendant Hodson would have been on 9 December 1966, the last date on which he could have successfully brought suit for plaintiff against Public Service Company.

Under the *Brantley* ruling alone, therefore, plaintiff's action would be barred in the present case in that it was instituted on 15 February 1972, some five years and two months after any cause of action accrued against the defendant for failure to file suit against Public Service Company before the statute of limitations barred that claim.

In this same connection, plaintiff also argues that the statute of limitations commences to run from the time on which the aggrieved party is entitled to recover "nominal damages"—here again, the date the statute of limitations was pleaded as a defense, 13 May 1971. It cites *Brantley, supra*, and *Jewell, supra* in support of that argument. We do not agree. While noting that nominal damages may be recovered in actions based on negligence, both of those cases clearly stand for the proposition that the statute of limitations immediately begins to run against the party aggrieved when there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover.

[4] Plaintiff's third argument, however, is convincing. Rule 56 of the N.C. Rules of Civil Procedure provides that summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. Plaintiff raised the issue of equitable estoppel in its reply to defendant's amended answer filed on 5 December 1977.

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Hence, a genuine issue as to a material fact was raised and the matter was properly to be resolved by a jury.

[3] The majority rule is that the doctrine of equitable estoppel may, in a proper case, be invoked to prevent a defendant from relying on the statute of limitations. The rule has evolved from the general principle that, when a defendant electing to rely upon the statute of limitations has previously, by deception or any violation of duty toward plaintiff, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold. The rule has been extended to situations involving silence when under an affirmative duty to speak. 53 C.J.S., Limitations of Actions, § 25, p. 962.

North Carolina is in line with the majority. In *Nowell v. Great Atlantic and Pacific Tea Company*, 250 N.C. 575, 108 S.E. 2d 889 (1959), our Supreme Court stated:

The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play." 250 N.C. at 579, 108 S.E. 2d at 891. (Citations omitted.)

Moreover, our Supreme Court has held that the doctrine of equitable estoppel is applicable to a situation when a party, having a duty to speak, remains silent, with a resulting disadvantage to another party. *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 (1937).

Of primary importance to our decision is the established rule of law that estoppel, or the existence thereof, is a question of fact for determination by the jury. 31 C.J.S., Estoppel, § 163, p. 784. That rule has been adopted by our Supreme Court. *Peek v. Wachovia Bank and Trust Company*, 242 N.C. 1, 86 S.E. 2d 745 (1955). In *Peek*, the Supreme Court stated: "It is only when a

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single inference can reasonably be drawn from undisputed facts that the question of estoppel is one of law for the court to determine."

[4] Plaintiff argues that defendant served in a fiduciary relationship with its predecessors in interest for approximately four and one half years from the date of his filing the complaint against Public Service Company, that defendant had an affirmative duty to disclose to the plaintiff his own negligence in the handling of the case and that his failure to do so during the four and one half years subsequent to his original negligent act should bar him from asserting a plea of the statute of limitations. Defendant counters and argues that he had withdrawn as counsel for plaintiff before Public Service Company filed its answer, before the motion for summary judgment by Public Service Company, and before the granting of summary judgment in favor of Public Service Company. Further, he argues that plaintiff's predecessors did not inform him of these events and therefore prevented him from arguing any reply to the answer or motion and prevented him from taking an appeal of the judgment entered on 8 November 1971. He further argues the doctrine of laches in answer to the claim of equitable estoppel, asserting that plaintiff's predecessors did not exercise due diligence in the prosecution of the claim against Public Service Company by failing to verify the complaint until after the statute of limitations had run. He further argues that, unlike the situation in *Nowell, supra*, he made no inducements to the plaintiff, was never paid any fee for services rendered, and that the "clean hands" doctrine precludes application of the doctrine of equitable estoppel. We would also note that defendant could have precluded the running of the statute of limitations by filing an unverified complaint or by the issuance of a summons pursuant to Rule 3, N.C. Rules of Civil Procedure. Numerous factual questions are obviously involved, and summary judgment by the trial court was, therefore, improper.

For the reasons stated, the judgment granting defendant's motion for summary judgment and dismissing plaintiff's claim is

Reversed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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WAYNE LEE LEWIS, BY AND THROUGH HIS GUARDIAN, BETTY LEWIS v.
CLYDE DOVE

No. 7814SC211

(Filed 6 February 1979)

Automobiles § 63.2— striking of child—negligence in failing to blow horn

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to exercise proper caution upon seeing plaintiff, a nine-year-old child, near the highway where it tended to show that plaintiff was attempting to cross the highway at a point other than within a marked or unmarked crosswalk when he was struck by defendant's car; the road was straight at the site of the accident and defendant was coming downhill; the distance between the crest of the hill and the point of impact was 425 feet; plaintiff stood beside the road at least a minute before he attempted to cross; plaintiff was looking in the other direction and failed to see defendant's approaching car; and defendant saw that a child was ahead of him on the side of the road, realized that a child's action is unpredictable, but failed to warn plaintiff of his approach by blowing his horn.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 8 November 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 December 1978.

Minor plaintiff, Wayne Lee Lewis, by his guardian *ad litem*, brought this action against defendant seeking to recover damages for injuries sustained by him and for medical expenses incurred when he was struck by a motor vehicle operated by defendant. Defendant answered, denying plaintiff's allegations of negligence and alleging contributory negligence as a bar to recovery by plaintiff. At the close of plaintiff's evidence, defendant's motion for a directed verdict on the ground "that there was not sufficient evidence of actionable negligence on his [defendant's] part to be submitted to the jury" was allowed, and judgment was entered for defendant. Plaintiff appeals.

Robert A. Beason, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner, for defendant appellee.

ERWIN, Judge.

Plaintiff contends that the trial court erred in allowing defendant's motion for directed verdict, G.S. 1A-1, Rule 50, in that

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the evidence presented by plaintiff was sufficient to take the case to the jury on defendant's negligence in failing to exercise proper caution upon seeing plaintiff, a minor child, near the highway. We agree with plaintiff.

Our Supreme Court held in *Adler v. Insurance Co.*, 280 N.C. 146, 148, 185 S.E. 2d 144, 146 (1971):

"On defendant's motion for a directed verdict at close of plaintiff's evidence in a jury case, as here, the evidence must be taken as true and considered in the light most favorable to plaintiff. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). When so considered, the motion should be allowed if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co., surpa.*"

This Court held in *Adams v. Curtis*, 11 N.C. App. 696, 697, 182 S.E. 2d 223, 224 (1971):

"[I]n determining the sufficiency of the evidence to go to the jury, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to her, giving her the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in her favor."

This rule has been followed by us in *Bray v. Dail*, 20 N.C. App. 442, 201 S.E. 2d 591 (1974); *Oliver v. Royall*, 36 N.C. App. 239, 243 S.E. 2d 436 (1978); and finally in *Johnson v. Clay*, 38 N.C. App. 542, 248 S.E. 2d 382 (1978).

At the trial, plaintiff, age nine, testified that: on 16 May 1975, he had ridden the school bus home from school; after getting off the bus at his house, he crossed Highway 98 (19 feet in width), which ran in front of his house, to go to his mailbox on the other side of the road; after checking the box, he slid into a ditch behind the box, climbed out, picked up his books, but he did not start to cross the road; first, he looked to his left and then to his right as he usually does; when he looked to his left up the hill, he did not see anything; he then looked to his right and saw a car approaching which passed him going to his left; he waited for the car to pass; he waited by the road a *minute*, looking to his right,

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because he did not hear anything coming from his left; he forgot to look to his left, because he did not hear anything, and usually he can hear cars if they are on the other side of the hill; his attention was attracted by a horn which sounded like it was coming from his right; without looking back to his left, he started onto the highway and was struck by defendant's car; he was at a 90 degree angle after he started across the road.

Defendant testified that: as he came over the hill, he saw plaintiff climbing out of the ditch on the side of the road; the speed limit is 55 m.p.h., but he was going 45 m.p.h., and upon seeing plaintiff, he reduced his speed to 35 m.p.h.; he kept his foot on the brakes as he came down the hill toward plaintiff; he thought plaintiff was playing on the side of the road and had no idea that plaintiff intended to cross the road; when he was approximately 75 feet from plaintiff, plaintiff ran onto the road, and he could not avoid hitting him. Defendant stated:

"[I] took my foot off the gas when I came over the crest of the hill. I pressed the brake a little bit and slowed down because I was going about 45, and I slowed down because I saw the boy and I didn't know, you know chillun, and I slowed it down. . . .

BY MR. BEASON:

Q. But you are not sure if he ever looked toward you, are you?

A. He had to look toward me to see the horse on my car.

Q. All right, sir, Mr. Dove, from the time you saw the child, from the first time you saw him, until the time that your car hit him you never blew the horn?

A. I didn't have time."

Plaintiff's other evidence showed that the accident occurred about 3:00 p.m. At the scene of the accident, the speed limit is 55 m.p.h. There was a hillcrest about 425 feet away from the scene of the accident; where the accident occurred, the highway was straight and downhill. Defendant left 47 feet of skid marks up to the point of impact and 17 feet of skid marks after the point of impact. These skid marks were straight and in the middle of the westbound lane of travel up to the point of impact, where they

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swerved slightly left. Defendant's car was a 1964 Buick, and plaintiff was located 26 feet past the point of impact.

Defendant contends that it is undisputed that plaintiff was attempting to cross N. C. Highway 98 at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection. G.S. 20-174(a) provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." Plaintiff was under a positive legal duty to yield the right-of-way to defendant's car. On the other hand, plaintiff contends that the law imposes upon a motorist a duty with respect to pedestrians who may be on or near a roadway. G.S. 20-174(e) provides:

"Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

Our Supreme Court held in *Wainwright v. Miller*, 259 N.C. 379, 130 S.E. 2d 652 (1963), in affirming judgment for plaintiff, that the evidence permitted the inference that a motorist failed to see a child ahead of him walking on the sidewalk near the curb when, in the maintenance of a proper lookout, he should have seen the child, or that the motorist saw the child but ignored the possibility that the child might run into the street in front of his car, and did not blow his horn or use proper care with respect to speed and control of the vehicle, and that omission of duty in one or the other of these respects was the proximate cause of fatal accident, is sufficient to overrule nonsuit. In the case before us, defendant recognized that a child was ahead of him on the side of the road; he realized that a child's action is unpredictable, but he failed to warn the child of his approach by blowing his horn.

In *Wanner v. Alsup*, 265 N.C. 308, 310-11, 144 S.E. 2d 18, 19-20 (1965), Chief Justice Denny spoke for our Supreme Court on the subject in reversing nonsuit granted by the trial court at the close of the plaintiff's evidence:

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"The mere fact that plaintiff's testatrix attempted to cross Valley Street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. This Court, in *Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323, in construing subsections (a) and (e) of G.S. 20-174 in connection with this question, said:

'Here, the evidence discloses that the intestate was crossing the street diagonally within the block, at a point which was neither at an intersection nor within a marked crosswalk, and the evidence discloses no traffic control signals at the adjacent intersections. Therefore, under the provisions of G.S. 20-174(a) it was intestate's duty to "yield the right of way to all vehicles upon the roadway."

'If it be conceded that the intestate failed to yield the right of way as required by this statute, even so, it was the duty of the defendant, both at common law and under the express provisions of G.S. 20-174(e), to "exercise due care to avoid colliding with" the intestate.
* * *

'Nor may the evidence tending to show that intestate failed to yield the right of way as required by G.S. 20-174(a) be treated on this record as amounting to contributory negligence as a matter of law, particularly so in view of the testimony to the effect that intestate at the time he was struck had reached a point about 10 feet from the west curb of the street. Our decisions hold that failure so to yield the right of way is not contributory negligence *per se*, but rather that it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. (Citations omitted.)"

Taking the evidence in the light most favorable to plaintiff, at the site of the accident, the road was straight, and defendant was coming down hill. From the crest of the hill to the point of impact was 425 feet. Defendant testified: "I can't say how far I was from the boy when I first came over the hill and saw him. I saw him when I came over the top of the hill. He was over there in the

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ditch." Plaintiff testified that he stood beside the road a minute after he got out of the ditch. "I know how long a minute is because I have a watch with a second hand that has two points on it with a car on each end. I watched one car go all the way around. I thought that was a minute. That is how long I waited."

Plaintiff was looking to his right oblivious to defendant approaching from his left. Defendant could have or should have seen plaintiff in this position looking to his right. From the evidence in the record and the legitimate inferences arising therefrom, a jury could have found, but not compelled to find, that defendant was negligent on this occasion, resulting in injury to plaintiff.

"The amount or degree of diligence and caution which is necessary to constitute due, reasonable, or ordinary care varies with changing conditions or with the facts and circumstances of each particular case, according to the exigencies which require vigilance and attention. Therefore, what is ordinary, reasonable, or due care depends on the circumstances of each particular case." 65 C.J.S., Negligence, § 11(3), p. 578.

To us, the plaintiff's evidence does not tend to show contributory negligence on his part as a matter of law. Plaintiff's being nine years old falls in that age group of children between seven years and fourteen years, where there is a rebuttable presumption of their incapability of contributory negligence.

We hold that: (1) Plaintiff's evidence, taken in the light most favorable to him, would permit a jury to find that defendant's negligence caused his injuries; therefore, defendant's motion for a directed verdict was improperly granted. (2) Defendant's motion for a directed verdict on the grounds that minor plaintiff was guilty of contributory negligence as a matter of law was properly denied.

Judgment affirmed on defendant's assignment of error, and judgment reversed on plaintiff's assignment of error.

Reversed in part and affirmed in part.

Judges PARKER and HEDRICK concur.

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STATE OF NORTH CAROLINA v. GEORGE E. BURNETT AND RAYMOND
EARL SANDERS

No. 7810SC833

(Filed 6 February 1979)

**1. Criminal Law § 34.5— purchase of stolen property by undercover agent—
other dealings with defendants—competency to show identity**

In this prosecution for breaking and entering a motor vehicle and larceny, an officer's testimony that he had worked in an undercover capacity buying and selling property and returning it to its rightful owners and that he had seen and talked to one defendant sixteen times and to the second defendant thirteen times during that period, if evidence of prior crimes, was nonetheless admissible to develop properly the evidence with regard to a telephone call the officer received from defendants in connection with the crimes charged and to identify defendants as the persons with whom the officer had dealt and the circumstances under which he purchased the stolen property in question from defendants.

2. Criminal Law § 74— statement by unidentified defendant—harmless error

In this prosecution of two defendants for breaking and entering a motor vehicle and larceny of photography equipment therefrom, the admission of an undercover agent's testimony that one of the defendants told him that they had some camera equipment and asked him how much he would give for it, if erroneous because defendant could not remember which defendant made the statement, was harmless where each defendant admitted participating in the sale of the camera equipment to the agent and contended that it had been purchased from another and resold to the agent, since the identity of the defendant who made the statement was therefore irrelevant.

**3. Criminal Law § 48— absence of Miranda warnings—silence of defendant—use
for impeachment**

Where a defendant who had not been advised of his *Miranda* rights and who, therefore, had received no implicit assurance that his silence would not be used against him waited until he took the witness stand in his defense to reveal the identity of the allegedly true perpetrator of the crimes with which defendant was charged, the prosecutor could cross-examine defendant with regard to his prior silence as to the identity of the alleged perpetrator.

APPEAL by defendants from *Brewer, Judge*. Judgments entered 23 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 10 January 1979.

The defendants were each charged with breaking or entering a motor vehicle and felonious larceny. Upon their pleas of not guilty to all charges, the jury returned verdicts of guilty as charged. From judgments sentencing each defendant to imprisonment

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for a term of five years for breaking or entering a motor vehicle and ten years for felonious larceny with the sentences to run consecutively, the defendants appealed.

The State's evidence tended to show that on Friday, 24 February 1978, Ollie Benjamin Garris, Jr., had several items of photography equipment in his car. That evening he drove to the parking lot of a restaurant, locked the doors of the car and left it parked while he ate dinner. Upon returning to his car, he drove it to his home and parked next to his house. Garris had not used the car at any other time during that weekend. The following Monday morning Garris discovered his photography equipment missing.

John P. Rowland was working in an undercover capacity for the Wake County Sheriff's Department on 25 February 1978. At approximately 10:00 a.m. on that date, Rowland received a telephone call from the defendant Raymond Earl Sanders. Although Sanders did not specifically mention anyone's name other than his own, he told Rowland during the conversation that "they had some stuff" for him. Rowland went to an apartment building in which both Sanders and the defendant George Burnett lived at approximately 1:00 p.m. that day. Both defendants were in the front yard of the apartment when he arrived and after a brief conversation the three men went into Sander's apartment. The defendants offered to sell Rowland some photography equipment which he purchased at that time. Garris later identified the equipment Rowland had purchased as the same equipment which had been stolen from his car.

The defendants presented evidence tending to show that the defendant Sanders was contacted by a man known as Ike on 24 February 1978. Ike offered to sell Sanders some photography equipment at that time, but Sanders did not have enough money to make the purchase himself and asked Burnett to help him pay for the equipment. The two defendants bought the equipment and sold it to Rowland the following day.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

Fred M. Morelock for the defendant appellant.

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MITCHELL, Judge.

[1] The defendants first assign as error the trial court's admission of Deputy Rowland's testimony concerning a series of meetings he had with the defendants prior to 25 February 1978. Deputy Rowland testified that he was working in an undercover capacity buying property and returning it to its rightful owners on and prior to 25 February 1978. He additionally testified that he had seen Burnett sixteen times between 19 December 1977 and 25 February 1978 and that he had seen Sanders thirteen times during the same period. The defendants contend that this testimony was inadmissible evidence of prior crimes. We do not agree.

Evidence that a defendant has committed a criminal offense other than that for which he is being tried is generally inadmissible. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, if the evidence tends to prove any relevant fact other than the defendant's character or his disposition to commit the crime charged, the evidence is admissible. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); 1 Stansbury's N.C. Evidence § 91 (Brandis Rev. 1973). Here, Deputy Rowland testified that on each of the occasions on which he had seen the defendants prior to 25 February 1978, he had had occasion to talk with them. He then testified to receiving a telephone call from the defendants and being able to recognize their voices as a result of the numerous prior conversations he had had with each. Even if we accept the doubtful proposition that the complained of testimony of Deputy Rowland was in fact evidence of prior crimes, it was nonetheless admissible as competent to develop properly the evidence with regard to the telephone call he received from the defendants in connection with the crimes charged. *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). Additionally, this evidence served to identify the defendants as the individuals with whom the deputy had dealt and the circumstances under which the purchase of the photography equipment was made. This assignment of error is overruled.

[2] The defendants next assign as error the admission of testimony by Deputy Rowland regarding a statement made to him by one of the defendants. Rowland testified that after he had entered Sanders' apartment, one of the defendants said, "We got

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this camera equipment man, what will you give me for it?" The defendants contend that this evidence was inadmissible as Rowland could not remember which defendant made the statement. Assuming arguendo that the admission of this testimony was error, we find it harmless beyond a reasonable doubt. Each defendant admitted participating in the sale of the photography equipment, and neither based his defense upon a denial of that sale. As each defendant admitted participating in the sale and this testimony by Rowland merely corroborated the defendants' evidence, the identity of the particular defendant making the statement was irrelevant. The admission of this testimony was not prejudicial to the defendants in any respect and, therefore, any error in its admission was clearly harmless. This assignment of error is overruled.

[3] The defendants also contend that the trial court erred in allowing the prosecutor to question Sanders concerning his failure to make a statement after his arrest. The defendants argue that such questioning amounted to a prejudicial comment by the prosecutor on Sanders' exercise of his right to remain silent. Under the facts of these particular cases, we do not agree.

During the trial of these cases, the defendant Sanders chose to testify in his own behalf. On cross-examination, the prosecutor asked the defendant the following questions:

Q. Have you ever before this day, sitting on that witness stand, ever said anything to any law enforcement man, woman, or whatever, about this person Ike?

A. No.

Q. Have you ever said anything to the District Attorney's Office prior to today sitting on this witness stand here, said anything at all about this man Ike?

MR. HOWARD: Objection.

COURT: Overruled.

A. No.

In *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), the Supreme Court of the United States stated that "the use for impeachment purposes of petitioners' silence, at the time

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of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619, 49 L.Ed. 2d at 98, 96 S.Ct. at 2245. The Court indicated that its holding was necessary because the Miranda warnings implicitly assured a defendant that his silence would not be used against him. However, the holding in *Doyle* appears to have been carefully limited to situations in which the defendant has been advised of his Miranda rights prior to his exercise of his right to remain silent. See *Doyle v. Ohio*, 426 U.S. 610, 625-26, 49 L.Ed. 2d 91, 101, 96 S.Ct. 2240, 2248 (1976) (Stevens, J., dissenting, joined by Blackmun and Rehnquist, J.J.).

Nothing in the record on appeal before us in these cases indicates that either of the defendants were advised of their Miranda rights. As there is no evidence that these defendants were ever advised of their Miranda rights, advice as to those rights could not have implicitly assured them that their silence would not be used. Therefore, the Court's holding in *Doyle* did not prohibit the use of the defendants' silence by the State in the context of the facts of these particular cases.

When a defendant receives no assurance whatsoever that his silence will not be used against him, we do not believe it would be unreasonable or unfair to expect the accused to tell the authorities the identity of the perpetrator of the crime with which the defendant is charged, if the defendant has reason to believe that the perpetrator is someone other than himself. If the defendant has not been advised of his right to remain silent and waits until he takes the witness stand in his defense to first reveal the identity of the allegedly true perpetrator, the prosecutor may reveal the tardiness of any such statement as it tends to reflect upon the credibility of the statement. As the defendant Sanders was not given any explicit or implicit assurance that his silence would not be used against him, the trial court did not commit error in allowing the prosecutor to cross-examine him with regard to his prior silence which was otherwise relevant and admissible.

In addition, the defendants did not properly object to the introduction of the evidence in question on cross-examination. Generally, when evidence is admitted without objection, any objection to the evidence is waived. *State v. Banks*, 295 N.C. 399,

In re Hardy

245 S.E. 2d 743 (1978); 1 Stansbury's N.C. Evidence § 27 (Brandis Rev. 1973). The defendants objected to a second question eliciting the same evidence. Having once allowed this evidence to come in without objection, the defendants waived their objections to the evidence and lost the benefit of later objections to the same evidence. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); 1 Stansbury's N.C. Evidence § 30 (Brandis Rev. 1973). As these defendants did not object to the first question and answer tending to impeach credibility in this matter, any objection to such questions was waived. Therefore, the defendants' final assignment of error is overruled.

The defendants received a fair trial free from prejudicial error. With regard to the judgments against each defendant in these cases, we find

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

IN THE MATTER OF VICKIE LYNN HARDY

No. 7812DC834

(Filed 6 February 1979)

Infants § 20— delinquent child proceeding—failure of court to make required findings

In a delinquent child proceeding where the evidence tended to show that respondent drank a beer and pushed her foster mother, the trial court erred in committing respondent to a training school without first finding that respondent would not adjust in her home, albeit a foster one, on probation or while other services were furnished. G.S. 7A-286(5).

APPEAL by respondent from *Carter, Judge*. Order entered 25 May 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 January 1979.

On 17 May 1978, petitions were filed alleging that respondent was a delinquent child as defined by G.S. 7A-278(2). More specifically, the first petition alleged:

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"That the child is a delinquent child as defined by GS 7A-278(2) in that at and in the county named above and on or about the 16th day of May, 1978, the child did unlawfully and wilfully possess a bottle of beer as defined by GS 18A-2. The child on said date being a minor under 18 years of age.

The offense charged here is in violation of GS 18A-8(2)."

The second petition alleged:

"That the child is a delinquent child as defined by GS 7A-278(2) in that at and in the county named above and on or about the 16th day of May, 1978, the child did unlawfully and wilfully assault her foster mother by pushing her.

The offense charged here is in violation of GS 14-33(a)."

The adjudicatory hearing was conducted 25 May 1978. The court found respondent a delinquent child. At the dispositional hearing, Mrs. Susan Westbrook, a social worker, testified that Vickie's mother could no longer control her. She also testified as to disciplinary problems respondent had in her foster home and at school. Mrs. Westbrook testified as to the unavailability of community agencies to place Vickie. Finally, she stated:

"[A]t this time Vickie needs a structured environment, such as a training school, while we work on a placement for her that would be more suitable. At this time we have no way to keep her in one spot and make sure that she is okay, because she will not listen to the parents or authorities."

The court entered a commitment order, from which respondent appeals.

Attorney General Edmisten, by Associate Attorney Steven Mansfield Shaber, for the State.

Public Defender Mary Ann Tally, by Assistant Public Defender Rebecca J. Bosley, for respondent appellant.

ERWIN, Judge.

Respondent assigns as error the trial court's order committing her to training school without making two of the findings required by G.S. 7A-286(5). This assignment has merit. G.S. 7A-286(5) provides in relevant part:

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"In the case of a child who is delinquent, the court may commit the child to the Department of Human Resources, for placement in one of the residential programs operated by the Department, provided the court finds that such child meets each of the following four criteria for commitment to an institution and supports such finding with appropriate findings of fact in the order of commitment as follows:

- a. The child has not or would not adjust in his own home on probation or while other services are being provided;
- b. Community-based residential care has already been utilized or would not be successful or is not available;
- c. The child's behavior constitutes some threat to persons or property in the community or to the child's own safety or personal welfare."

G.S. 7A-286(5) requires the trial court to find that a delinquent child meets each of the listed criteria before commitment.

In *In re Steele*, 20 N.C. App. 522, 525, 201 S.E. 2d 709, 712 (1974), we held that it was not incumbent upon the trial judge to incorporate detailed findings of fact in his juvenile commitment order. We said: "We do not think, however, that it is incumbent upon the trial judge to incorporate detailed findings of fact in his order. We think the order in the *instant* case was adequate and was supported by the evidence." (Emphasis added.)

In *Steele, supra*, the respondent had, without provocation, pulled a pistol and shot another youth causing serious injury. The court's dispositional order made the following findings of fact:

"THE COURT MAKES THE FURTHER FOLLOWING FINDINGS OF FACT:

- (1) that said juvenile's behavior constitutes a threat to persons and or property in the community and further constitutes a threat to his own personal welfare and safety;
- (2) that the community resources and or community-level alternatives available would not meet the needs of the juvenile; and

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- (3) that it would be in the best interest and welfare of the above named juvenile that he be committed to the Board of Youth Development for an indeterminate period of time, not to exceed his 18th birthday, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the above named juvenile, one Cedric Steele, be COMMITTED to the BOARD OF YOUTH DEVELOPMENT for an indeterminate period of time, however, not to exceed his 18th birthday. Said juvenile to be detained at the Juvenile Diagnostic Center pending his placement by the Board of Youth Development. The Juvenile Diagnostic Center is hereby authorized to render to said juvenile such medical and surgical care as may be prescribed for him by a licensed physician.

THIS the 26th day of September, 1973.

C. E. JOHNSON
Presiding Judge."

Id. at 524, 201 S.E. 2d at 711. We held that under these circumstances, the judge's order sufficiently met the dictates of G.S. 7A-286(5).

Here the evidence tends to show that respondent drank a beer and pushed her foster mother. If nothing more, the evidence indicates a maladjusted child. There is no evidence in the record of prior violations of law. It may be finally determined that commitment is the proper disposition in this case. Nevertheless, the North Carolina Juvenile Act requires the court to consider the welfare of the "delinquent child" as well as the "best interest of the State." See *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd sub nom., McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971).

Our Legislature, in G.S. 7A-277, states the purpose of Article 23 as follows:

"§ 7A-277. *Purpose.*—The purpose of this Article is to provide procedures and resources for children within the juvenile jurisdiction of the district court which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults. These procedures are intend-

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ed to provide a simple judicial process to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State. The intent of this Article is to assure that, where possible, the court will arrange for the available community resources to be utilized to strengthen the child's family relationships in order to avoid removal of the child from his own home or community. Therefore, this Article should be interpreted as remedial in its purposes to the end that any child subject to the procedures applicable to children in the district court will be benefited through the exercise of the court's juvenile jurisdiction."

The fact that the proceeding is a juvenile proceeding does not lessen the burden upon the State to see that the child's rights are protected. *In re Meyers*, 25 N.C. App. 555, 214 S.E. 2d 268 (1975). Juvenile proceedings may nevertheless result in commitment to an institution in which a juvenile's freedom is curtailed. The court must consider the needs of the child. In *In re Berry*, 33 N.C. App. 356, 360, 235 S.E. 2d 278 (1977), we stated:

"[T]he record does not reveal, and the court made no finding of fact from which it can be determined that such a condition is fair and reasonable, relates to the needs of the children, tends to promote the best interest of the children, or is in conformity with the avowed policy of the State in its relation to juveniles. We are not unmindful of the rights of the injured parties in such cases. (See G.S. 1-538.1) but a requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate *that the best interest of the juvenile will be promoted by the enforcement of the condition.*" (Emphasis added.)

In the instant case, the trial court entered the following order:

"JUVENILE DISPOSITION ORDER

(The Juvenile Disposition Order was received by counsel for the respondent on May 31, 1978).

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This case came on for disposition, the above named child having been found within the juvenile jurisdiction of the court as a delinquent child. The following persons were present for the hearing: Vickie Lynn Hardy—Child; Karen and Carl Wooters—Foster Parents; Susan Westbrook—Social Worker.

The child was represented by Rebecca Bosley—Attorney at Law.

After considering the factual evidence, the needs of the child, and the available resources, the court finds from the facts shown below that the following disposition would best provide for the protection, treatment, rehabilitation and correction of the child:

FINDINGS OF FACT

1. That said child is in need of the care, protection and discipline of the State.

2. That said child has been in the legal custody of the Cumberland County Department of Social Services since June of 1974; that in February of 1977, the physical custody of said child was placed with her mother on a trial basis; that said child was beyond the disciplinary control of her mother and the Cumberland County Department of Social Services assumed physical custody on April 3, 1978, and placed said child in the foster home of Mr. and Mrs. Wooters; that from April 3, 1978 until the filing of this petition, said child has been beyond the disciplinary control of her foster parents in that: (1) She made long distance telephone calls without permission in excess of twenty-five (\$25.00) dollars, (2) The foster parents had to disconnect the telephone to keep her from adding additional long distance calls, (3) That the foster parents had to pull fuse plugs to keep said child from using lights and television, (4) That said child was totally beyond the disciplinary control of the conscientious foster parents, (5) That said child ran away from the Denmark Foster Home where she was staying for a weekend, (6) That said child has been absent or tardy from school all but five (5) days since April 3, 1978.

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3. That said child has failed to respond to foster home placement and community resources are unable to meet the needs of said child.

4. That it will promote the welfare of said child and be to the best interest of the State to place her custody within a controlled, structured environment as that provided by the North Carolina Department of Human Resources.

IT IS THEREFORE ORDERED that said child be and remain a Ward of the Court and her custody is committed to the Juvenile Services Division of the North Carolina Department of Human Resources for an indefinite period not to extend beyond her 18th birthday under conditions and authority as contained in Article 23, Chapter 7A of the General Statutes of North Carolina.

This 25th day of May, 1978.

s/ DERB S. CARTER
Chief District Judge"

In the order, the court failed to consider whether or not respondent would not adjust in her home, albeit it be a foster one, on probation or while other services were furnished. We hold that it was incumbent upon the trial court to consider this criterion of the statute. Our Legislature intended for the court to consider all information relevant to the disposition of a delinquent child. *Cf. State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975). Unlike the statute in *State v. Mitchell, Id.*, G.S. 7A-286(5) specifically requires appropriate findings of fact in the order of commitment.

The order entered below is reversed and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

Hankins v. Somers

DONALD REID HANKINS v. ROBERT VANCE SOMERS, JOHN HANN, MARTHA GREENWAY, AND YOUTH OPPORTUNITIES UNLIMITED

No. 7819SC181

(Filed 6 February 1979)

1. Appeal and Error § 6.6— denial of motion to dismiss not appealable

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of G.S. 1-277(a), does not affect a substantial right, and is not appealable.

2. Rules of Civil Procedure § 52— motion to dismiss denied—no findings absent request

In the absence of a request, the trial court was not required to make findings of fact in support of its denial of defendants' motion to dismiss for lack of jurisdiction.

3. Rules of Civil Procedure § 11— pleading not verified—no lack of credibility implied

Since G.S. 1A-1, Rule 11(a) provides that generally pleadings need not be verified, no lack of credibility is implied by absence of a verification.

4. Rules of Civil Procedure § 12— motion to dismiss—reliance on material admissible at trial

In ruling on a motion to dismiss for lack of personal jurisdiction, the trial judge should rely only on material that would be admissible at trial.

5. Constitutional Law § 24.7; Process § 9.1— nonresident individuals and partnership—contacts with N. C.—personal jurisdiction

Where plaintiff's complaint alleged that the nonresident individual defendants and defendant partnership entered into a conspiracy to copy and market plaintiff's national marketing program for the sale of highway emergency kits by high school and college students, allegations based upon plaintiff's personal knowledge and belief were insufficient as a basis for an exercise of jurisdiction over the out of state defendant partnership, and the placing of advertisements in national magazines by the partnership, without more, was not sufficient contact with this State to permit an exercise of personal jurisdiction over the partnership; however, by conducting a wire art business in N. C., though unrelated to the business activities which plaintiff sought to prohibit, the individual defendants had sufficient contacts with the State to permit the exercise of personal jurisdiction over them.

APPEAL by defendants from *Collier, Judge*. Order signed 9 December 1977 in Superior Court, ROWAN County. Heard in the Court of Appeals 28 November 1978.

Plaintiff's complaint alleges that he is the developer of a unique national marketing program for the sale of highway emergen-

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cy kits by high school and college students, which he operates through a business called American Youth Enterprises (AYE). It is alleged that defendant Somers is his attorney, and that plaintiff has revealed to Somers in the course of the attorney-client relationship confidential information about the marketing program. Plaintiff alleges that since November 1976 Somers has joined with the other defendants in a partnership to operate a business called Youth Opportunities Unlimited (YOU) for the purpose of copying and passing off as their own his marketing program.

Defendant Somers moved to dismiss each claim for relief on the ground that it stated no claim upon which relief could be granted. The other defendants, all residents of Georgia, moved to dismiss for lack of personal jurisdiction. Both motions to dismiss were denied, and defendants appeal.

Brinkley, Walser, McGirt & Miller, by Walter F. Brinkley, for defendant appellant Somers.

Kenneth L. Eagle for defendant appellants Hann, Greenway and YOU.

No counsel for plaintiff appellee.

ARNOLD, Judge.

[1] Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of G.S. 1-277(a), does not affect a substantial right, and is not appealable. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), and cases cited therein. Appeal by defendant Somers is therefore premature and must be dismissed.

The other defendants, however, are entitled by G.S. 1-277(b) to an immediate appeal of the denial of their motion to dismiss for lack of jurisdiction.

Plaintiff alleges that defendants Hann and Greenway are residents of Georgia and that defendant YOU is a general partnership having its principal office and place of business in Georgia. He alleges that in approximately November of 1976 they entered into a conspiracy with defendant Somers, a North Carolina resident, to copy and market his idea, and that defend-

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ant Somers acted as both partner and agent of the Georgia defendants.

Defendants Hann and Greenway, in support of their motion to dismiss, filed affidavits that they are residents of Georgia and general partners in defendant YOU; that YOU has its principal and only office in Georgia and has never had an office in North Carolina; that there are no other partners, either general or limited, in the business; that YOU has no directors or salesmen in North Carolina; that to the best of the affiants' knowledge no YOU products have ever been sold in North Carolina; and that defendant Somers is not a partner, the attorney or the agent of YOU.

Plaintiff filed an affidavit in opposition to the motion to dismiss. He stated that defendants Hann and Greenway had sold the products of another business in which they were engaged in North Carolina to a substantial extent, and that YOU placed an advertisement identical to plaintiff's advertisement for AYE in a national magazine. He further alleged on information and belief that defendant Somers, as a partner in and agent of YOU, solicited several North Carolina residents to write to plaintiff for material about his marketing program, so that the material could be passed on to YOU.

[2] Error is first assigned to the failure of the court to make findings of fact in support of the denial of their motion to dismiss. G.S. 1A-1, Rule 52(a)(2) provides that the judge need not make findings of fact when ruling upon a motion unless required by Rule 41(b) or requested by a party to do so. No request was made in this case. "It is presumed, when the Court is not required to find facts . . . and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E. 2d 509, 510-11 (1976).

[3, 4] Defendants also contend that plaintiff's evidence in opposition to the motion was not credible because the complaint was unverified and the affidavit contained statements sworn to on information and belief. G.S. 1A-1, Rule 11(a) provides that generally pleadings need not be verified, so no lack of credibility is implied by the absence of a verification. In support of their contention that any matters contained in plaintiff's affidavit on information and belief should be stricken, defendants argue that the require-

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ment of G.S. 1A-1, Rule 56(e) that affidavits on motions for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein" should be read into G.S. 1A-1, Rule 43(e). To the extent that Rule 43(e) applies to a motion to dismiss, we agree. A motion to dismiss can result in termination of a lawsuit just as much as a motion for summary judgment. Accordingly, the judge should rely only on material that would be admissible at trial in ruling on the motion.

[5] We thus consider whether there were sufficient allegations based upon plaintiff's personal knowledge to support the exercise of personal jurisdiction over the Georgia defendants. G.S. 1-75.4 sets out the grounds for personal jurisdiction. G.S. 1-75.4(3) deals with injury arising from an act or omission within the State. Here the only allegation of a local act or omission on the part of defendant YOU is the allegation that defendant Somers as partner in and agent of YOU did some acts of the conspiracy within North Carolina. As this allegation was based only upon plaintiff's information and belief, it was not properly before the trial court, and there is no basis for an exercise of jurisdiction over YOU under subsection (3).

G.S. 1-75.4(4) provides for jurisdiction where there is a local injury arising from a foreign act or omission *and* solicitation or services were carried on by defendant within the state *or* defendant's products were used there in the ordinary course of trade. There is no allegation that YOU's products were used within North Carolina. It is alleged, however, that defendant YOU placed an advertisement in national magazines circulating in North Carolina, and it has been held that such solicitation is sufficient to satisfy the statutory requirement. See *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D. N.C. 1972), *aff'd* 473 F. 2d 909 (4th Cir. 1973). However, we need not determine whether we are in accord with the federal courts on this question, since we hold that even if the statute is satisfied here, due process is not.

As was pointed out in *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977), a question of *in personam* jurisdiction requires a two-part inquiry: whether the statutory requirements are met, and if they are, whether the exercise of

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jurisdiction authorized by the statute satisfies due process. Assuming that the statutory requirement of "solicitation within the State" is satisfied, we find that the placing of advertisements in national magazines, without more, is not sufficient contact to fall within "'traditional notions of fair play and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945), as a basis for the exercise of personal jurisdiction.

With respect to defendants Hann and Greenway, plaintiff alleged in his affidavit opposing the motion to dismiss that from 1974 through the time of his lawsuit the defendants were engaged in the business of selling wire art products, and that such products were sold and used in North Carolina in the ordinary course of trade to a substantial extent. This allegation is sufficient to satisfy G.S. 1-75.4(4). "There is no requirement that the cause of action, pursuant to which the jurisdictional claim is raised, be related to the activities of the defendant which gives [sic] rise to the in personam jurisdiction." *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366, 1372 (M.D.N.C. 1973). The plaintiff has met his initial burden of proving the existence of jurisdiction by a prima facie showing that the statutory requirements have been met, *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976), and the defendants have not contradicted his allegations. We find that the requirements of due process are also satisfied. By their wire art business activities, defendants have "purposefully [availed themselves] of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958).

As to defendant Somers, appeal dismissed.

As to defendant YOU, reversed.

As to defendants Hann and Greenway, affirmed.

Judges HEDRICK and VAUGHN concur.

State v. Robinette

STATE OF NORTH CAROLINA v. JACKIE RAND ROBINETTE

No. 7822SC788

(Filed 6 February 1979)

1. Homicide § 21.1— solicitation to commit murder—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for solicitation to commit murder where it tended to show that defendant told an SBI informant that he wished to kill an officer who had made a drug buy from defendant for which defendant was arrested and that he might need help, defendant acquiesced in the informant's suggestion to seek help from another who was in fact an SBI agent, and defendant stated to the SBI agent that he wanted the officer killed and agreed to pay the price set by the SBI agent for the killing, notwithstanding defendant never paid the \$1,000 down payment agreed upon for the killing.

2. Criminal Law § 88.3— cross-examination—collateral matter—State bound by defendant's answers—other evidence admitted without objection not substantially the same

In a prosecution for solicitation to commit murder in which defendant denied on cross-examination that he had killed "the Green boys" up in Caldwell County or that he had told a witness that he committed those killings, the trial court erred in permitting the witness to testify on rebuttal for impeachment purposes that defendant had told him that he had killed "the Green boys," since defendant's testimony on cross-examination related to a collateral matter, and the State was therefore bound by defendant's answers and could not introduce evidence to contradict them. Nor was such testimony rendered harmless by the admission without objection of testimony that defendant had told another witness that he had been involved "in something like this before," since that testimony was not substantially the same as the testimony concerning the killing of "the Green boys."

APPEAL by defendant from *Collier, Judge*. Judgment entered 17 May 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 5 December 1978.

Defendant was indicted for soliciting SBI Special Agent Furr to murder Jimmie Morris, a police officer assigned to undercover drug investigation. The State presented evidence that on 15 December 1977 Morris made a drug buy from defendant, for which defendant was arrested. James Marshall Self, an SBI informant, testified that on 15 January 1978 defendant said to him that he was going to kill Morris and Bobby Wagoner. Self told the defendant he might be able to take care of the problem for him, and two days later he set up a meeting between defendant and

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Furr, who was known to defendant as "David Warren." At the meeting the possibility of killing Morris and the price were discussed. Defendant was arrested ten days later; during that time he had not offered "Warren" the \$1,000 downpayment that had been agreed upon or contacted him any further about the matter. During part of that time defendant was in the hospital as the result of a car wreck.

The defendant testified that he knew the people involved and that he had gone to the meeting with "Warren" at Self's suggestion, but that it was "Warren" who suggested killing Morris and defendant disagreed. He had been suspicious all along that "Warren" and Self were SBI agents, and went to the meeting just to confirm his suspicions.

The defendant was found guilty and sentenced to 10 years. He appeals.

Attorney General Edmisten, by Assistant Attorney General Patricia B. Hodulik, for the State.

Homesley, Jones, Gaines and Dixon, by Edmund L. Gaines, for defendant appellant.

ARNOLD, Judge.

Defendant urges this Court to hold that his motion to dismiss should have been granted because there was insufficient evidence, taken in the light most favorable to the State, of solicitation to submit to the jury. He argues that the evidence discloses that any counseling, enticing or inducing of another to commit a crime, the gravamen of the offense of soliciting, *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, cert. den. 434 U.S. 924 (1977), was done by the State's agent, Vance Furr.

[1] Looking at the evidence in the light most favorable to the State, we find the record reveals that defendant indicated to Self that he needed some help to kill Bobby Wagoner and Jimmie Morris. Self indicated that he and Furr might be able to help, and that he, Self, would contact Furr the following morning.

On the following morning, about 6:45 a.m., Self went to the house where defendant was staying. The two of them, and a third person, went to a telephone booth where Self called Furr and set

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up an appointment for defendant and Furr to meet at 1:00 p.m. that day.

Furr and defendant met at the designated time and place. According to Agent Furr the defendant told him that defendant had been "popped" by "a cop or a rat" to whom defendant had sold drugs, and that he did not intend to go to prison.

Defendant at first indicated to Furr that "I may need to have [Wagoner and Morris] killed." Defendant then indicated to Furr that he wanted "this Jimmie Morris character, who I think is an SBI agent from Monroe or somewhere in that area, killed." Furr then asked defendant, "You don't want anyone killed except the Morris fellow?" Defendant replied, "Yes." Furr then indicated that it would cost defendant \$3,000 and that he would require "\$1000.00 down." Defendant replied "[t]hat's cool," but he wanted "ten days or the first of the month to raise the money." Furr then reminded defendant, "Remember, it will take \$1000. down." Three days after this conversation a warrant was issued for defendant's arrest, and defendant was arrested approximately two weeks following this conversation with Agent Furr. Furr indicated that the police had waited an extra week to arrest defendant because defendant had been hospitalized as a result of an automobile wreck.

The evidence presents a reasonable inference that defendant had more than an interest in the possibility of killing Jimmie Morris. He indicated to Self that he wished to kill Morris and that he might need help, and he acquiesced in Self's suggestion to seek help from Furr. Defendant stated to Furr that he wanted Jimmie Morris killed and agreed to pay the price set by Furr. This is sufficient evidence from which a jury might find that defendant solicited Furr to kill Morris. Denial of defendant's motion for non-suit was not error.

Defendant's position that Furr merely made a proposal which was never accepted because defendant never paid the \$1,000 downpayment is untenable. While it is true that nothing was to be done unless defendant paid \$1,000, this was a condition imposed by Furr, the solicitee. The solicitation already had been made by defendant. It may easily be inferred that defendant would have paid Furr the \$1,000 immediately if he had had the money. The request by defendant for Furr to kill Morris complet-

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ed the crime of solicitation regardless of whether defendant could come up with the requested downpayment.

[2] Error is also assigned by defendant to the admission of certain rebuttal testimony. On cross-examination, defendant had testified: "No, I did not on May 31, 1976 kill Edward and A. C. Green up in Caldwell County. No, on June 1, 1976 I did not kill A. C. Green. I deny doing that. . . . No, I never told this man right there that I killed the Green boys." On rebuttal, the State recalled Marshall Self and asked him "what, if anything, the defendant Jackie Robinette told you about killing or murdering the Green boys." Defense counsel objected; the judge then instructed the jury that the testimony was admissible only for purposes of impeachment as a prior inconsistent statement. Asked, "What did he tell you about having to do about the killing of the Green boys?" Self then testified: "I said, 'Jackie, I know you can't get us any trouble, because I know you killed the Green boys.' He said, 'Yes, I did. I am going to tell you why. The sons-of-bitches ripped me off for nine pounds of heroin with a street value of \$300,000.00'"

We find no merit in the State's contention that this rebuttal evidence was properly admitted. "It is a general rule of evidence in North Carolina 'that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them'" *State v. Long*, 280 N.C. 633, 639, 187 S.E. 2d 47, 50 (1972). The test for distinguishing material from collateral matters is "whether the evidence . . . would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible." *Id.* at 640, 187 S.E. 2d at 51. Evidence about a purported killing of the "Green boys" had no relevance to the charge for which defendant was being tried, and would not have been admissible as part of the State's case-in-chief. No extrinsic evidence of this collateral matter should have been admitted.

The State contends, however, that even if the testimony were improperly admitted, no prejudicial error resulted from its admission. This argument is based on Furr's testimony, without objection, as follows: "Then I asked him, 'I understand you have

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been involved in something like this before.' Mr. Robinette replied, 'Yes.' . . . 'I have got to be very careful about what I say about the other thing I did, because a buddy of mine got busted by hiring some SBI agents to kill another person.' The State contends that this testimony was substantially the same as the evidence concerning the killing of the "Green boys." We disagree.

It is well-established that where evidence is admitted over objection but substantially the same evidence is admitted without objection, the benefit of the objection is lost. *E.g. State v. Wills*, 293 N.C. 546, 240 S.E. 2d 328 (1977); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). However, the evidence admitted here without objection is not "substantially the same" as the challenged testimony. There is no indication that the conversation with Furr about a previous killing referred to the deaths of the "Green boys."

A final assignment of error brought forth by defendant relates to the cross-examination of defendant about his use of heroin in Vietnam. The district attorney then asked defendant, "Did you ever frag the officers?" ("Frag" is the term used to describe the purported practice in Vietnam of enlisted men throwing hand grenades at their own officers.) Since defendant is to be given a new trial for the improper admission of prejudicial evidence, and since the district attorney is not likely to ask such an improper question at a new trial, we see no necessity to discuss defendant's contentions concerning this assignment of error.

New trial.

Judges VAUGHN and MARTIN (Robert M.) concur.

Hennessee v. Cogburn

FANNIE B. HENNESSEE v. CECIL COGBURN

No. 7830SC2

(Filed 6 February 1979)

1. Rules of Civil Procedure § 5— defendant in default—motion to set aside verdict—service not required

Service of a motion to set aside a verdict was not required since defendant was in default for failure to appear and plaintiff did not assert a new or additional claim for relief.

2. Rules of Civil Procedure § 59— setting aside verdict—motion made within ten days of verdict—power of trial court

It was within the trial court's discretion to set aside a verdict where the motion to set aside was made within ten days of the entry of the verdict, and the trial court did not lose this discretionary power when the term of court ended.

3. Damages § 17— amount of damages—minimum and maximum figures—no unbridled discretion given jury

When considered in conjunction with the court's earlier instruction as to what the jury could consider in awarding compensatory damages, the court's instruction that the jury could award "any sum from \$1.00 to \$20,000.00" did not leave the damages in the unbridled discretion of the jury.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 22 September 1977 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 27 September 1978.

The plaintiff brought this action against the defendant for malicious prosecution arising out of a worthless check charge against her which was dismissed. The plaintiff asked for \$25,000.00 in compensatory damages and \$50,000.00 in punitive damages. The defendant made no response and on 9 November 1976 an entry of default was made against him. At the January 1977 civil session with Judge Hasty presiding, and without the defendant's presence, an issue as to what amount of damages the plaintiff was entitled to recover of the defendant was submitted to the jury. The jury answered "none." On 11 January 1977, a judgment was entered, signed by Judge Hasty, ordering that the plaintiff recover nothing from the defendant. On 14 January 1977, the plaintiff filed two motions, one for a judgment notwithstanding the verdict, and the other that the verdict and judgment be set aside and a new trial be had upon the damage issue. Neither

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of the motions was ever served on the defendant. On 10 February 1977, the court entered an order in which it found "that grounds for a new trial exist, under Rule 59-A(7)" and ordered in its discretion that "the verdict previously rendered be set aside and a new trial, on the issue of damages, granted." The case was retried in September 1977 at which time the plaintiff was present and represented by counsel. The defendant was present, but did not have counsel. The plaintiff testified that because of her being prosecuted on the worthless check charge, she missed at least four days of work. She said she was so upset she could not do her work and on 1 September 1976 was discharged from her job as key-punch operator at Memorial Mission Hospital. She testified further that she was unemployed until 29 November 1976 at which time she got a job at Fletcher Hospital. Her wages had been \$3.20 per hour at Memorial Mission Hospital and they were \$3.00 per hour at Fletcher Hospital. She also testified the benefits were not as good at Fletcher Hospital as at Memorial Mission Hospital.

At the second trial, the jury awarded plaintiff \$12,500.00 in compensatory damages and nothing for punitive damages. On 22 September 1977, the court entered a judgment against the defendant for \$12,500.00.

Millar and McLean, by Russell L. McLean III, for plaintiff appellee.

Roberts, Cogburn and Williams, by Max O. Cogburn, for defendant appellant.

WEBB, Judge.

The appellant advances three arguments as to why it was error to set the verdict aside and retry the case. These are (1) notice of the motion to set the verdict aside was not served on him, (2) Judge Hasty did not have the power to set the verdict aside at a term of court subsequent to the one at which the verdict was entered, and (3) when a final judgment was entered at the January 1977 term of court terminating the case, the court had no jurisdiction at a subsequent term to make a valid order. The second argument is closely related to the third.

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The resolution of these questions depends on our Rules of Civil Procedure. Rule 59 of the North Carolina Rules of Civil Procedure says:

“(a) *Grounds*.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

* * *

(9) Any other reason heretofore recognized as grounds for a new trial.

* * *

(b) *Time for motion*.—A motion for a new trial shall be served not later than 10 days after entry of the judgment.”

Rule 5(a) of the North Carolina Rules of Civil Procedure says:

“(a) *Service—when required*.—[N]o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.”

[1] As to the appellant’s first argument, Rule 59(b) says that a “motion for a new trial shall be served not later than 10 days after the entry of judgment.” Rule 5(a) says “no service need be made on parties in default for failure to appear. . . .” We hold that Rule 59(a) when construed with Rule 5(a) means that service must be made within ten days when service is required. In this case service was not required under Rule 5(a) since the defendant was in default for failure to appear and the plaintiff did not assert a new or additional claim for relief.

[2] As to the appellant’s second and third arguments the motion to set the verdict aside was made within ten days of the entry of the verdict. Judge Hasty had the power under Rule 59(a)(9) to set the verdict aside in his discretion. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). We hold that he did not lose this power when the term of court ended. The defendant relies on *Pruett v. Pruett*, 247 N.C. 13, 100 S.E. 2d 296 (1957); *Burton v. Reidsville*, 243 N.C. 405, 90 S.E. 2d 700 (1956) and *Johnston v. Johnston*, 218

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N.C. 706, 12 S.E. 2d 248 (1940) as authority for the proposition that when a case has been finally determined a court has no power at a subsequent term to modify the judgment. None of these cases interpret Rule 5 or 59 of the Rules of Civil Procedure. They are not precedents for this case.

[3] The defendant's last assignment of error pertains to the charge. The court recapitulated the plaintiff's evidence as to the damage she had suffered. He then charged in part as follows: "In considering the amount of damages, if any, you may consider resulting loss of business or job, injury to reputation and mental suffering, As I say, the plaintiff says she has been substantially damaged, and you can answer that issue in any sum from \$1.00 to \$20,000.00." The defendant contends that by telling the jury it could answer the issue "in any sum from \$1.00 to \$20,000.00" the court placed the award in the unbridled discretion of the jury. When considered in conjunction with the court's earlier instruction as to what the jury could consider in awarding compensatory damages, we hold the court did not leave the damages in the unbridled discretion of the jury, but properly charged the jury what it could consider in awarding damages. See *Carter v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964).

It appears the jury may have awarded a substantial verdict for the damages proved. The trial judge did not disturb the verdict and we cannot interfere with his discretion.

No error.

Judges HEDRICK and ARNOLD concur.

JO ANN GILES GAMBLE, MARGARET G. AMAN, ATTIE E. GILES AND
JAMES E. GILES v. J. P. WILLIAMS, SR. AND INEZ CARROLL

No. 784SC258

(Filed 6 February 1979)

Deeds § 12.1— fee conveyed by granting clause, habendum and warranty—repugnant clause in introductory recital

A clause in the introductory recital of a deed executed in 1933 purporting to limit the title of the grantee to a life estate with remainder to the heirs of

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another was surplusage and of no effect where the granting clause, habendum and warranty gave the grantee an unqualified fee.

APPEAL by plaintiffs from *Reid, Judge*. Order entered 22 February 1978 in Superior Court, SAMPSON County. Heard in the Court of Appeals 10 January 1979.

The question presented on appeal involves the construction of a deed. On 16 June 1977, plaintiffs filed a complaint against defendants alleging that on 1 September 1933 a deed was recorded which conveyed 17.9 acres of land. The deed in question was prepared on a commercially printed form, and the blank spaces were completed in handwriting.

The introductory recital to the deed reads as follows: "THIS DEED, Made this 1st day of September 1933, by Freddie Giles of Sampson County and State of North Carolina, of the first part, to Maggie Giles, for the term of her natural life, then to the heirs of J. D. Giles. . . ."

Plaintiffs are the heirs of J. D. Giles. The complaint further alleges that Maggie Giles died on 28 February 1976 leaving a will which was duly probated in the Office of Superior Court of Sampson County. The will devised all of her property to Haywood Young Langdon, who subsequently conveyed the 17.9 acres described in the above deed to the defendants.

Plaintiffs' complaint requested a declaratory judgment adjudging them to be owners in fee simple of the land in question. On 15 August 1977, defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure on the grounds that the plaintiffs, as heirs of J. D. Giles, have no interest in the properties described in the deed.

At the hearing held on 22 February 1978 the parties, with the approval of the court, agreed that the motion should be treated as a motion for summary judgment. The court ordered that summary judgment should be granted in favor of defendants since there was no genuine issue as to any material fact. Plaintiffs appealed.

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Morgan, Bryan, Jones, Johnson, Hunter & Greene, by K. Edward Greene, for plaintiff appellants.

Doffermyre & Rizzo, by Daniel Rizzo and Warren and Fowler, by Stewart B. Warren for defendant appellees.

CARLTON, Judge.

The sole question for decision is whether the clause in the 1933 deed attempting to restrict the title of Maggie Giles to a term of her natural life with remainder to the heirs of J. D. Giles is valid and effective when it appears only in the introductory recital to the deed and is not referred to elsewhere. The trial judge concluded that the language was ineffectual. We agree.

Other sections of the deed must be examined to understand the question presented and this Court's decision. The granting clause reads as follows: "Freddie Giles . . . has bargained and sold, and by these presents does grant, bargain, sell and convey to said Maggie Giles heirs and assigns. . . ."

The habendum clause, following the description, reads as follows: "TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said Maggie Giles and her heirs and assigns, to her only use and behoof forever."

The warranty provides that Freddie Giles covenants, "with said Maggie Giles and her heirs and assigns. . . ."

Plaintiffs rely primarily on four decisions of our Supreme Court: *Triplett v. Williams*, 149 N.C. 394, 63 S.E. 79 (1908), *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948), *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706 (1960), and *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976). *Artis* and *Oxendine* established the rule of law that where an entire estate in fee simple is given the grantee in the granting, habendum and warranty clauses, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected. Plaintiffs contend, however, that *Triplett* and *Whetsell* carve at least two exceptions to the stated rule: (1) That when two clauses in a deed are repugnant to each other, the clause appearing first in the deed shall control its interpretation, and (2) The rule is applicable only to those situations where the inconsistency in the deed is contained in, or immediate-

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ly after, the description clause of the deed. We do not agree with plaintiff's interpretation of the prevailing case law.

It is true that in *Artis*, *Oxendine*, and *Whetsell* the inconsistent clause was in the description area of the deed. However, in all those cases, the granting, habendum and warranty clauses were in accord. We find no case which limits the *Artis* and *Oxendine* rule to situations where the inconsistent or repugnant clause appears only in the description. In *Wilkins v. Norman*, 139 N.C. 40, 51 S.E. 797 (1905), the repugnant clause followed the warranty in the deed rather than being inserted in the description. The court held that the clause was void and the Supreme Court in *Artis* cited with approval the result obtained in *Wilkins*.

We also do not agree with plaintiffs that the language in the introductory recital should prevail since it was the first language defining the estate granted. In the case cited to us which is most similar to the case at bar, *Ingram v. Easley*, 227 N.C. 442, 42 S.E. 2d 624 (1947), the deed in question purported to convey to husband and wife a tenancy by the entirety. The husband's name appeared only in the introductory recital setting out the names of the parties. The granting clause conveyed the property to the wife alone and her heirs and assigns, and the habendum and warranty were in accord. The court, in holding that the deed conveyed nothing to the husband, stated: "In the event of any repugnancy between the granting clause and *preceding or succeeding* recitals, the granting clause will prevail." (Emphasis added.)

In *Whetsell*, the Supreme Court thoroughly analyzed existing case law as well as G.S. 39-1.1 enacted by the 1967 General Assembly. That statute, applicable only to conveyances executed after 1 January 1968 provides:

- (a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.
- (b) The provisions of subsection (a) of this section shall not prevent the application of the rule in *Shelley's* case.

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In *Whetsell*, Justice Moore clearly stated the North Carolina rule:

By the enactment of this statute, the General Assembly clearly indicated its intention to leave the law relating to conveyances executed prior to 1 January 1968 unchanged and that the rule as stated in *Artis v. Artis, supra*, and *Oxendine v. Lewis, supra*, should remain in effect for conveyances executed prior to that date. Granting that this rule may occasionally subvert the real intention of the grantor, these particular instances of hardship can better be endured than the uncertainty and confusion of titles resulting from sudden and radical changes in well settled rules of property.

Finally, this Court has more recently addressed the issue raised in this appeal. In *Waters v. Phosphate Corp.*, 32 N.C. App. 305, 232 S.E. 2d 275 (1977), this Court interpreted *Whetsell* to establish the rule of law that conveyances executed prior to 1 January 1968 shall be interpreted by the courts in accordance with the principles enunciated in *Artis*, *Oxendine* and other earlier cases, and deeds executed after 1 January 1968 shall be interpreted in accordance with the provisions of G.S. 39-1.1.

Therefore, in the instant case, the clause in the introductory recital purporting to limit the title of Maggie Giles to a life estate with remainder to the heirs of J. D. Giles, though expressing an obvious intent of the grantor, must be deemed to be surplusage without force or effect.

For the reasons stated, the order of the trial court is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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RUTH MAE ROGERS v. CURTIS ROGERS

No. 7817DC261

(Filed 6 February 1979)

1. Divorce and Alimony § 18.3— attorney's fees—amendment of complaint to demand proper

In an action for permanent alimony, alimony *pendente lite*, and custody and support of children, the trial court did not err in granting plaintiff's motion to amend the complaint to include a demand for attorney's fees.

2. Divorce and Alimony § 18.16— allegations of inability to pay and dependency—award of counsel fees proper

Allegations by plaintiff in an alimony and child support action that she was the dependent spouse and that she had insufficient means to support her children during the pendency of the suit were sufficient to support an award of counsel fees to plaintiff.

3. Divorce and Alimony § 18.16— plaintiff's ability to pay costs of suit—reasonableness of attorney's fees—failure to make findings

The trial court in an action for alimony erred in failing to make findings as to plaintiff's ability to defray the expense of the suit and in failing to make findings as to the reasonableness of the attorney's fees incurred.

4. Divorce and Alimony § 25.11— child custody order—sufficiency of findings

Findings of fact by the trial court that defendant had been convicted of criminal non-support, had willfully refused to provide support during the pendency of this action, and had hit his son with a tire tool and cut plaintiff with a knife during a family quarrel were sufficient to support the court's order granting custody of the children to plaintiff.

5. Divorce and Alimony § 24.1— child support—determining amount

In an action for child support, the trial court properly took into consideration defendant's necessary living expenses and properly awarded an abandoned automobile and cut wood, both of minimal value, which were located at the marital home for support of the children.

6. Divorce and Alimony § 24— child support—possession of homeplace

In an action for alimony and child support, the trial court did not err in awarding possession of the marital home owned by the parties as tenants by the entirety as part of support.

APPEAL by defendant from *Clark, Judge*. Judgment entered 17 January 1978 in District Court, CASWELL County. Heard in the Court of Appeals in Winston-Salem on 5 December 1978.

Plaintiff filed this action on 30 September 1977 for permanent alimony, alimony *pendente lite*, custody and support for her

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two minor children, possession of the marital home and divorce from bed and board. At the close of the *pendente lite* hearing, the court granted plaintiff's motion to amend the complaint to include a demand for counsel fees. The court awarded custody to the plaintiff and exclusive possession of the marital home for the use of plaintiff and her children. Plaintiff was also awarded some cut wood and an abandoned car which were on the marital property to be sold and the proceeds used for the support of the children. Defendant was ordered to pay \$500.00 in attorney's fees and \$70.00 every two weeks for support.

Upperman & Johnson by Angela R. Bryant for plaintiff appellee.

Bethea, Robinson, Moore & Sands by Alexander P. Sands III for defendant appellant.

CLARK, Judge.

[1] Defendant first contends that the court erred in granting plaintiff's motion to amend the complaint to include a demand for attorney's fees. G.S. 1A-1, Rule 15(a) provides that leave to amend shall be "freely given when justice so requires." The trial judge has broad discretionary powers to permit amendments to any pleading. *See, Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785 (1954), and the court's ruling is not reviewable on appeal in absence of a showing of abuse of discretion. *Mangum v. Surles*, 12 N.C. App. 547, 183 S.E. 2d 839 (1971), *rev'd on other grounds*, 281 N.C. 91, 187 S.E. 2d 697 (1972). The burden is upon the party objecting to the amendment to set forth the grounds for his objection and to establish that he will be prejudiced if the motion is allowed. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

There is no indication that the defendant was prejudiced by the court's order or that the judge abused his discretion in granting plaintiff's motion. Defendant's first assignment of error is overruled.

[2] Defendant contends that the court erred in awarding counsel fees to plaintiff because there was no allegation that plaintiff was unable to "defray the expense of the suit." G.S. 50-13.6. The plaintiff, however, alleged that she was the dependent spouse and

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alleged that she had insufficient means to support the children during the pendency of the suit. These allegations are sufficient.

[3] Defendant further contends that the court erred in awarding counsel fees since there was no finding of fact that the plaintiff was unable to defray the expense of the suit. In *Nolan v. Nolan*, 20 N.C. App. 550, 202 S.E. 2d 344, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974), this court held that where the trial court failed to make a finding of fact as to the wife's ability to defray the expense of the suit as required by G.S. 50-13.6, the trial court abused its discretion in awarding attorney's fees to the wife. *See also*, *Roberts v. Roberts*, 38 N.C. App. 295, 248 S.E. 2d 85 (1978); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977); *In re Cox*, 17 N.C. App. 687, 195 S.E. 2d 132, *cert. denied* 283 N.C. 585, 197 S.E. 2d 809 (1973). The court erred in failing to make such findings.

Defendant further contends that there were insufficient findings of fact relating to the nature and scope of the legal services rendered by plaintiff's counsel. The court requested and received a detailed affidavit from plaintiff's counsel setting forth the nature of the legal services and the scope of the services. The court, however, failed to make a finding as to the reasonableness of the fees as required by *Lindsey v. Lindsey*, *supra*; *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977); *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 204 S.E. 2d 198 (1974), *modified on other grounds* 290 N.C. 373, 226 S.E. 2d 347 (1976); *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971). The court erred in failing to make findings of fact as to the reasonableness of the attorney's fees incurred.

[4] The defendant also contends that the court erred in awarding custody of the minor children to plaintiff because the court failed to find sufficient facts upon which to base the award. *See Austin v. Austin*, *supra*. We find no merit in defendant's contention. The court found that the defendant had been convicted of criminal non-support on 22 October 1974, that defendant had willfully refused to provide support during the pendency of this action and that on 24 July 1977, defendant hit his son, Curtis, Jr., with a tire tool and cut the plaintiff under the arm with a knife during a family quarrel. Both the plaintiff and her son were treated at the hospital as a result of injuries inflicted by defend-

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ant. The court made ample findings of fact to support the order granting custody of the children to the plaintiff. See *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971); *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133 (1953). Defendant's assignment of error is overruled.

[5] The defendant also contends that the court erred in awarding the type and amount of child support because the court failed to account for defendant's living expenses. In *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), the trial court awarded support by dividing defendant's wages by the number of his dependents. The North Carolina Supreme Court held that the court erred because the court failed to consider both the needs of the children and the living expenses of the defendant. Here, the court found that the plaintiff had a net income of \$65.00 per week and expenses of \$520.00 per month, that the house payments were in arrears, that the telephone had been disconnected, and the electricity had been turned off at the homeplace. The plaintiff paid \$147.00 to regain electrical service and still owes \$300.00 to the telephone company. The court found that defendant's net income was \$149.18 every two weeks and ordered defendant to pay \$70.00 every two weeks for support. The findings of the court indicate that the needs of all parties were taken into consideration by the trial court.

The defendant also argues that the court erred in awarding the 1969 Buick Electra and the cut wood which were located at the marital home for the support of the children, without making findings of fact as to the value of the property. The court found that the abandoned automobile and the wood were of "some value," clearly indicating that the value of the items was minimal. If the defendant establishes that monies received from the sale of the automobile and wood was substantial then the defendant should notify the court of the amount received by plaintiff from the sale of the items and the court shall reconsider the child support award.

[6] Defendant's fourth contention is that the court erred in awarding the possession of the marital home owned by the parties as tenants by the entirety. Defendant contends that G.S. 50-13.4(e) does not give the court the authority to transfer possession of real property. In *Arnold v. Arnold*, 30 N.C. App. 683, 228

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S.E. 2d 48 (1976) and *Boulware v. Boulware*, 23 N.C. App. 102, 208 S.E. 2d-239 (1974), this court held that "the trial judge may award exclusive possession of the homeplace, even though owned by the entirety, as a part of support under G.S. 50-13.4." 30 N.C. App. at 685, 228 S.E. 2d at 50. Defendant's assignment of error is overruled.

That portion of the order relating to the award of attorney's fees is vacated and remanded for the trial court to make findings of fact in regard to the ability of the plaintiff to defray the expenses of the suit and the reasonableness of the attorney's fees incurred.

Affirmed in part, Reversed and Remanded in part.

Judges MITCHELL and WEBB concur.

STATE OF NORTH CAROLINA v. JAMES HAYWOOD

No. 7818SC673

(Filed 6 February 1979)

1. Receiving Stolen Goods § 5.1— goods stolen by someone else—sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for feloniously receiving stolen goods where the State's evidence tended to show that a suit priced at \$215.00 was stolen from a Durham clothing store, that defendant later sold the suit and two others for \$80.00 to the police during an undercover operation, and that the suit had a price tag on it for \$215.00, and defendant testified that for three years he had been in the business of buying suits on sale at various stores and reselling them, since the jury could find from defendant's evidence that he bought the suit in question from someone else at a lower price than he sold it and that the suit was stolen by someone other than defendant.

2. Receiving Stolen Goods § 6— instructions—goods stolen by someone else—nonfelonious receiving

In this prosecution for feloniously receiving stolen goods, the trial court sufficiently instructed the jury that goods must have been stolen by someone other than defendant, and the court did not err in charging that "non-felonious receiving of stolen goods differs from feloniously receiving stolen goods in that the goods need not be worth more than \$200.00."

Judge MARTIN (Robert M.) dissenting.

State v. Haywood

APPEAL by defendant from *Crissman, Judge*. Judgment entered 24 February 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 November 1978 in Winston-Salem.

Defendant was charged in a bill of indictment, proper in form, for the offense of receiving stolen goods in violation of G.S. 14-71. Defendant entered a plea of not guilty and was found guilty as charged. From a judgment sentencing him to imprisonment for a term of not less than five years nor more than seven years, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender D. Lamar Dowda, for defendant appellant.

ERWIN, Judge.

[1] At the close of all the evidence, defendant moved for judgment as in the case of nonsuit on the charge against him on the ground that the evidence was insufficient to take his case to the jury. The trial court denied the motion, and defendant assigns the ruling as error. We do not agree.

Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. When there is sufficient evidence, direct or circumstantial, by which the jury could find the defendant had committed the offense charged, then the motion should be denied. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 4 Strong's N. C. Index 3d, Criminal Law, § 106, p. 547.

The State's evidence in this case tends to show from the testimony of Raymond Jones, the manager of McLeod-Watson-Van Straaten Clothing Store, that in January 1977, he discovered a Hart-Schaffner and Marx suit missing from his store in Durham. He had seen defendant in the store on various occasions. The suit was priced at \$215.00. The records of the store indicate that the suit had not been sold. On 26 January 1977, defendant entered a

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"t.v. repair shop" in Greensboro, which was operated by the Greensboro Police Department in an undercover operation designed to recover stolen property. Defendant was carrying a green garbage bag with three suits in it and eventually sold them for \$80.00. One of the three suits was the Hart-Schaffner and Marx suit in question with a price tag on it for \$215.00.

Defendant testified that for three years, he had been in the business of buying suits on sale at various stores and reselling them. Defendant could not recall how he came into possession of the suit involved in this prosecution. From this evidence, a reasonable inference arises that defendant bought the suit in question from someone else at a lower price than he sold it, from which a jury could find that the Hart-Schaffner and Marx suit was stolen by someone other than defendant.

The State was not required to show that the receipt of the goods took place in Guilford County.

We hold that the evidence presented was sufficient to take the case to the jury on the offense of receiving stolen goods and fully supports the verdict of guilty. *See State v. Lash*, 21 N.C. App. 365, 204 S.E. 2d 563 (1974), *appeal dismissed*, 285 N.C. 593, 206 S.E. 2d 865 (1974).

Defendant makes three assignments of error relating to the charge of the court. We find no merit in these assignments. Defendant first avers that the trial court erred in failing to properly instruct the jury regarding circumstantial evidence, in that said instructions fell below the requirements for such under North Carolina law. Defendant did not request any instructions. We find the charge on circumstantial evidence, when viewed in its totality, is sufficient. The jury was cautioned to scrutinize this type of evidence more closely than direct evidence, and the burden of proof was "beyond a reasonable doubt."

[2] Defendant contends that the trial court erred in its final mandate to the jury on the offense of felonious receiving. We do not agree. The record reveals that the court charged that the State must prove five things beyond a reasonable doubt:

"First, that this gray suit, the Hart-Schaffner & Marx suit, was stolen by someone other than the defendant.

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Second, that the defendant received or concealed this suit of clothes.

Third, that the defendant at the time that he received or concealed that suit of clothes knew or had reasonable ground to believe that it was stolen.

Fourth, that the defendant received or concealed that property with a dishonest purpose; that is, that he intended to permanently deprive the original owners of that suit of clothes and appropriated it entirely to his own use and benefit.

Fifth, that the suit of clothes was worth more than \$200.00."

In the final mandate, the court charged:

"Now, members of the jury, the Court, therefore, charges you that if you find from the evidence beyond a reasonable doubt that on or about this 26th day of January, 1977, that this defendant, James Haywood, with a dishonest purpose received this gray suit of clothes and that it was worth more than \$200.00 and that he knew or had reasonable grounds to believe *that someone else had stolen it* and that if you are satisfied of this beyond a reasonable doubt, then it would be your duty to return a verdict of guilty of feloniously receiving stolen goods." (Emphasis added.)

To us, the charge appears to be clear and adequate.

We find no error in the court's charge to the jury on the lesser included offense of non-felonious receiving. The value of the stolen goods in this case is only material on the charge of felonious receiving. The court properly charged that the jury must find beyond a reasonable doubt that the suit of clothes was worth more than \$200.00. The court charged further:

"[I]t would be your duty then to determine whether or not this defendant would be guilty of non-felonious receiving of stolen goods.

Now, members of the jury, non-felonious receiving of stolen goods differs from feloniously receiving stolen goods in that the goods need not be worth more than \$200.00."

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The record discloses no prejudicial error.

No error.

Judge PARKER concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

Defendant was indicted under G.S. 14-71 for receiving stolen goods (specifically, a man's suit, valued in excess of \$200) and was convicted of that offense. State's evidence tended to show that the defendant possessed stolen property, and may have been sufficient to be submitted on a charge of larceny, but the record before us is devoid of any evidence pertinent to the defendant's having received the goods or their having been stolen by someone other than the defendant. Therefore, judgment of nonsuit should have been entered at the close of the State's evidence, *State v. Burnette*, 22 N.C. App. 29, 205 S.E. 2d 357 (1974); *State v. Emanuel*, 267 N.C. 663, 148 S.E. 2d 588 (1966). Accordingly, I would vote to vacate the conviction appealed from and to reverse the judgment entered below.

STATE OF NORTH CAROLINA v. STEPHEN LOUIS MOORE

No. 7824SC839

(Filed 6 February 1979)

Criminal Law § 91.6; Constitutional Law § 44— seventeen days to prepare defense—continuance improperly denied

The trial court erred in denying defendant's motion for continuance in order to prepare for trial since defendant's counsel moved for the continuance on the same day they were retained; counsel were retained seventeen days before the case was called for trial, and six of those days were Saturdays and Sundays; and counsel did not have a reasonable opportunity to investigate, prepare and present their defense.

APPEAL by defendant from *Howell, Judge*. Judgment entered 12 August 1977 in Superior Court, WATAUGA County. Heard in the Court of Appeals 10 January 1979.

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Defendant was indicted upon two charges of kidnapping and two charges of assaulting an officer with a firearm on 24 February 1977. The charges were consolidated for trial. Upon conviction of all charges, judgments of imprisonment were entered.

On 25 February 1977, Banks Finger of the Watauga County bar was appointed as counsel for defendant. He did not initiate any discovery proceedings prior to 21 July 1977. On 21 July 1977, Triggs & Hodges, attorneys in Morganton, North Carolina, were retained as counsel for defendant. On that date Triggs filed a motion for continuance and motion for discovery. On 5 August 1977, Triggs filed notice of hearing on the discovery motions, motion for change of venue, motion to dismiss indictments, and notice of intent to rely on defense of insanity. The cases came on for trial 8 August 1977. On 5 August 1977, attorney Finger filed motion to be discharged as attorney for defendant. Attorney Triggs objected to this motion, arguing that he had moved for a continuance in the case and that if the continuance was not granted, then attorney Finger should remain in the case to assist in representation of defendant. The motion was allowed and attorney Finger discharged as counsel for defendant.

Next, defendant's motion for continuance was heard. Defendant presented evidence tending to show that he met one time with attorney Finger prior to preliminary hearing; a preliminary hearing was held; thereafter defendant did not meet with Finger to discuss the case or prepare for trial; Finger did not ask him what happened; on and after 21 July 1977 he met with Triggs several times; he told Triggs about several witnesses who were essential; some witnesses were from out of state or out of Watauga County; he did not have time to contact all of them; some of the witnesses concerned his psychiatric condition. Defendant attempted to have the assistant district attorney, Rusher, sworn to testify. The court did not require Rusher to be sworn but allowed him to answer Triggs' questions. Triggs stated that he was not prepared to try the case; that he had been in the case only seventeen days and six of those days were Saturdays or Sundays when the courthouse was closed; that he realized on 21 July 1977 he could not adequately prepare for trial by 8 August 1977 and, therefore, filed the motion on that date; the district attorney did not respond to the motion; the district attorney never

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responded to Triggs' motion for discovery. Defendant's motion for continuance was denied.

Defendant appealed and argued twenty-one assignments of error.

Attorney General Edmisten, by Associate Attorneys J. Chris Prather and Jane Rankin Thompson, for the State.

Triggs & Hodges, by C. Gary Triggs, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant assigns as error the denial of his motion to continue. Continuances of cases are not favored in the law. Chief Justice Sharp, speaking for the Supreme Court in *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E. 2d 380, 386 (1976), said:

[B]efore ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice. The rule has been well stated as follows:

"In passing on the motion the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record, although . . . it may take into consideration facts within its judicial knowledge The motion should be granted where nothing in the record controverts a sufficient showing made by the moving party, but since motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." [17 C.J.S. Continuances § 97 (1963).]

Ordinarily, such motions are addressed to the sound discretion of the trial judge and not subject to review absent abuse of discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

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However, in criminal cases constitutional tests may arise on motions for continuance. Where a motion is based upon a right guaranteed by the federal or state constitutions, the question is one of law, and the ruling of the court is one of law and not of discretion and is reviewable on appeal. *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976). Defendant argues the Sixth Amendment rights to production of witnesses and assistance of counsel. Similar provisions are contained in Article I, Sections 19 and 23, of the North Carolina Constitution.

Defendant's counsel filed the motion for continuance immediately after being retained. Defendant's evidence tended to show counsel knew they could not be prepared by the 8 August session of court. It was a period of only seventeen days, including three Saturdays and three Sundays. They had no opportunity to determine whether the State had any discoverable material. The disclosure on the trial date that the State had no such material, except the pistol, came too late to help defendant prepare his defense. Rusher did not communicate with defendant's counsel during this period.

Defendant's evidence tended to show defendant's counsel were unable to secure the attendance of several witnesses they considered material to defendant's defense. One was Susan Westfall, who had lived with defendant for some time. She and defendant had two children. They were not married. Susan had talked to defendant by telephone while the alleged crimes were being committed. About this date Susan had told defendant she was leaving him and taking their children. She had been to North Dakota to her mother's home.

In defendant's motion for continuance, one of the grounds was to secure a psychiatric evaluation of defendant. Defendant's family had a history of mental illness. Defendant had been receiving treatment at the Mental Health Center under Dr. Feldman and counsellor Lennie. The record is not clear whether this was before the alleged crime or after defendant's arrest. In either event, it indicates defendant may have been suffering from some mental or psychiatric condition that could have affected his defense.

The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare

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for trial. However, no set length of time for investigation, preparation and presentation is required and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Alderman*, 25 N.C. App. 14, 212 S.E. 2d 205, cert. denied, 287 N.C. 261, 214 S.E. 2d 433 (1975). "A continuance ought to be granted if there is an apparent probability that it will further the ends of justice." *State v. Gibson*, 229 N.C. 497, 502, 50 S.E. 2d 520, 524 (1948). Such probability arises upon the voir dire hearing in this motion. The denial of the motion to continue was prejudicial error. We cannot find beyond a reasonable doubt that it was harmless error. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967).

The trial court did not make any findings upon constitutional grounds but based its order solely upon the discretion of the court. We hold defendant's counsel, Triggs & Hodges, did not have a reasonable opportunity to investigate, prepare and present their defense, which is a violation of the constitutional guarantees of right to assistance of counsel. Under the circumstances of this case, seventeen days was not a reasonable time for defendant's counsel to comply with defendant's constitutional right to assistance of counsel in his defense. While the prompt trial of criminal cases is to be encouraged, we must not allow justice to fall into Charybdis in seeking to avoid Scylla. In preventing delays, "courts should not try cases with such speed as to raise a suspicion that 'wretches hang that jurymen may dine.'" *State v. Gibson*, *supra* at 502, 50 S.E. 2d at 525.

With this holding we do not discuss the other assignments of error, which may not occur upon retrial.

The conviction and sentences are vacated and the actions remanded for

New trial.

Chief Judge MORRIS and Judge CARLTON concur.

In re Scaringelli

IN THE MATTER OF: FRANK SCARINGELLI, CLAIMANT AND UNIVERSITY
OF NORTH CAROLINA, CHAPEL HILL, EMPLOYER AND EMPLOYMENT
SECURITY COMMISSION OF NORTH CAROLINA

No. 7810SC247

(Filed 6 February 1979)

**Master and Servant § 108— unemployment compensation—abandonment of
research assistantship—no abandonment of “work”**

Appellee's termination of his studies at the University of North Carolina and subsequently his research assistantship did not constitute a voluntary abandonment of “work” within the meaning of G.S. 96-14(1) so that appellee was disqualified for unemployment benefits.

APPEAL from *McLelland*, Judge. Judgment entered 3 January 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 10 January 1979.

Claimant last worked on 10 September 1976 for the University of North Carolina at Chapel Hill as a teaching assistant on a fellowship granted by the University to students. Claimant's teaching was not part of the curricular requirement for him. The teaching required about twelve hours' work per week, and he was paid \$100.00 per month.

Claimant quit his studies at the University, thereby terminating his work as a teaching assistant. He felt that driving daily to Chapel Hill from Cary to study and teach was too great a burden. Mr. Scaringelli's claim for unemployment benefits was denied by John Swiggett, Claims Deputy. Mr. Swiggett stated: “. . . I have determined that you voluntarily quit your last job but without good cause attributable to the employer, therefore, you will be disqualified five weeks from September 19, 1976, through October 23, 1976, because of separation from U.N.C., Section 96-14(1) of the Law applies.”

Mr. Scarengelli appealed. Ultimately, the Employment Security Commission affirmed Mr. Swiggett's decision. On 9 September 1977, claimant appealed to the Superior Court, Wake County. On 3 January 1978, Judge McLelland heard evidence and entered the following order:

“IT NOW, THEREFORE, IS ORDERED, ADJUDGED AND DECREED that the decision of the Employment Security Com-

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mission under Docket No. 5478 be and the same is reversed and the appellant, Frank Scaringelli, shall not be disqualified pursuant to G.S. 96-14(1) and is eligible to receive unemployment insurance benefits for the period beginning September 19, 1976 and continuing through October 16, 1976.

Done at Raleigh, North Carolina, this the 3rd day of January, 1978.

s/ D. M. McLELLAND
Judge Presiding"

The Employment Security Commission appealed.

Chief Counsel Howard G. Doyle, Garland D. Crenshaw, and Thomas S. Whitaker, by V. Henry Gransee, Jr., for appellant, Employment Security Commission of North Carolina.

Frank P. Scaringelli, pro se.

ERWIN, Judge.

Appellant presents only one question for our determination:

"Did the Superior Court err in finding as a matter of law that the appellant's work as a teaching assistant was not 'employment' pursuant to G.S. 96-8 (6)g.15., and therefore G.S. 96-14(1) is not applicable and no disqualification thereunder shall be imposed?"

We agree with appellee that his employment did not constitute "work" within the meaning of the statute. We find no error in the order entered by the Superior Court.

Our Legislature's purpose in enacting the Employment Security Act is set forth in G.S. 96-2:

"§ 96-2. *Declaration of State public policy.*—As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon

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the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

Our Legislature sought to provide aid to those out of "work" through no fault of their own. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Nowhere in the act is the word, "work," defined. Appellant concedes that appellee's services at the University were not employment. It argues that "work" should be given its natural and ordinary meaning and that appellee's claim is consequently disqualified under G.S. 96-14(1). G.S. 96-14(1), at the time the claim was filed, provided:

"§ 96-14. *Disqualification for benefits.*—An individual shall be disqualified for benefits:

- (1) For not less than four, nor more than 12 consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left *work* voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount." (Emphasis added.)

The recent amendment by the Legislature has no bearing on this case. G.S. 96-14(1)'s specific ground for disqualification of

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benefits when applicable prevails over the general policy provisions of G.S. 96-2. See *In re Usery*, 31 N.C. App. 703, 230 S.E. 2d 585 (1976), *dis. rev. denied*, 292 N.C. 265, 233 S.E. 2d 396 (1977). Sections imposing disqualifications for unemployment benefits should be strictly construed in favor of the claimant and should not be enlarged by implication. *In re Watson*, *supra*. Where, as here, the context requires a different construction, a word may be construed so as to effectuate legislative intent. *In re Watson*, *supra*.

In Webster's Third New International Dictionary (unabridged, 1976), "work" is defined as "the labor, task, or duty that affords one his accustomed means of livelihood." This is the type of "work" to which G.S. 96-14(1) applies. Appellee's services are not covered therein. His services are not "employment" within the meaning of the act, see G.S. 96-8(6)k.13 [originally enacted as G.S. 96-8(6)g.15], nor do they constitute work within the meaning of G.S. 96-14(1). It is common knowledge that many of our universities' graduate students receive financial aid. Oftentimes, they are required to work as research assistants to qualify for aid. Upon completion or termination of their studies, these students are ineligible for such aid. The aid is not a permanent method of earning a livelihood, but only a temporary job taken on and performed along with normal school work and subordinate thereto. See *In re Augustine*, 9 A.D. 2d 837, 192 N.Y.S. 2d 801 (1959). If an applicant successfully completes his studies, he is again eligible for unemployment benefits and is to be treated like any other applicant. *Wyka v. Colt's Patent Fire Arms Mfg. Co.*, 129 Conn. 71, 26 A. 2d 465 (1942).

We hold that appellee's termination of his studies and subsequently his research assistantship did not constitute a voluntary abandonment of "work" within the meaning of G.S. 96-14(1).

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

Honea v. Bradford

DUANE ROBERT HONEA AND ROBERT K. HONEA v. J. H. BRADFORD, JR.,
MARY M. BRADFORD AND BOBBY BRADFORD

No. 7814DC259

(Filed 6 February 1979)

1. Automobiles § 53.2— child riding mini bike—negligence in failing to stay on right side of road

In an action to recover for personal injuries resulting from a collision between minor plaintiff's bicycle and minor defendant's mini bike, the evidence was sufficient for the jury on the issue of minor defendant's negligence in the operation of the mini bike where it tended to show that the accident occurred on the left-hand side of the road; minor defendant turned his mini bike into minor plaintiff's lane; the minor plaintiff moved his bicycle out of his way and minor defendant came over again; and the minor plaintiff moved to the side of the road and was struck by minor defendant's mini bike.

2. Negligence § 5.1; Parent and Child § 8— mini bike—dangerous instrumentality—liability of parent for injury caused by child

In an action to recover for personal injuries resulting from a collision between minor plaintiff's bicycle and minor defendant's mini bike, the evidence was sufficient for the jury to find that the minor defendant's father was negligent in entrusting a dangerous instrumentality to his minor son where it tended to show that the mini bike was a gift from defendant father to the 12-year-old son; the mini bike was a "small motorcycle" with a 49 cc gas-operated engine, an automatic three-speed transmission, and a seat that could carry more than one; defendant was aware that his son was "below average when compared with a normal child"; defendant father showed his son how to operate the bike but had given no instructions in safety or the rules of the road; and although defendant father had told his son not to ride the mini bike in the road, he did not keep the key or lock the bike and the key was left on a cabinet in the house "with no one responsible really."

APPEAL by defendants James and Bobby Bradford from *Gantt, Judge*. Judgment entered 28 October 1977 in District Court, DURHAM County. Heard in the Court of Appeals 11 January 1979.

The minor plaintiff by his guardian ad litem brings this action to recover for his personal injuries allegedly resulting from a collision between plaintiff's bicycle and the minor defendant's mini bike. He also seeks damages from the adult defendants for their negligence in entrusting the mini bike to the minor defendant.

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Defendant Bobby Bradford testified that on 10 September 1973, when he was 12 years old, he was riding his Honda Trail 50 motor bike when he collided with the plaintiff. The accident occurred all the way over on the left-hand side of the road. His speed at the time was five to ten miles an hour. "I did apply brakes but did not have time to stop as he weaved over in front of me and I cut over to get away from him, he come back and I did not have time to stop." The motor bike hit the plaintiff's bicycle at the front wheel and plaintiff was thrown to the ground. At the impact plaintiff's mouth hit defendant's head. Bobby's parents knew that he had ridden the bike in the past, but he had never ridden it in a public street in their presence or with their knowledge.

Plaintiff testified that the accident occurred when "Bobby turned over into my lane. I moved out of his way and he came over again. I went off to the side of the road and I got over as far as I could as there was a two foot bank and then he hit me. . . ." Plaintiff's dentist testified that he treated the plaintiff the day after the accident and found that he had eight loose teeth and lacerated gums. Root canal work was done on two of the teeth.

At the close of the plaintiff's evidence a motion for directed verdict was sustained as to the femme defendant. Defendant James Bradford then testified that he had given the bike to his son and told him never to ride it on the street. He showed Bobby how to operate the bike but told him nothing about safety or the rules of the road, and the key was left lying on a cabinet in the house. Bobby "is below average compared to a normal child."

The jury found for the plaintiff and awarded him \$3,000. Defendants appeal.

Powe, Porter, Alphin & Whichard, by N. A. Ciompi, for plaintiff appellees.

E. C. Harris for defendant appellants.

ARNOLD, Judge.

It is the sole contention of each defendant that the trial court erred in failing to grant each defendant's motion for directed verdict and for judgment notwithstanding the verdict.

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[1] The minor defendant argues that the only allegations of negligence refer to his use of the motor bike upon a public road in violation of the statutory provisions, and that it has not been proved that Trevor Circle, where the accident occurred, is in fact a public road. This interpretation of the case ignores the allegations of negligence which do not rely on statutory violations or a finding that Trevor Circle is a public street, specifically: (1) failure to keep a proper lookout, (2) failure to keep the motor vehicle under proper control, (3) operating the motor vehicle at excessive speed, (4) failure to take adequate evasive maneuvers in order to avoid colliding with the plaintiff, and (5) operating a motor vehicle with defective brakes. While violation of a statute may be negligence per se, see 9 Strong's N.C. Index 3d, Negligence § 1.3, certainly it is not necessary for one to violate a statute in order to be negligent. "A person who enters upon an active course of conduct is under positive duty to exercise ordinary care to protect others from harm, and a violation of this duty is negligence." *Id.* § 1.1 at 344. In the case at bar, the plaintiff testified: "Bobby turned over into my lane. I moved out of his way and he came over again. I went off to the side of the road and I got over as far as I could as there was a two foot bank and then he hit me. . . ." There is sufficient evidence to support a finding that the defendant was operating his motor bike negligently. Defendant's motions for directed verdict and judgment notwithstanding the verdict were properly denied.

[2] Defendant James Bradford, Bobby's father, also contends that a directed verdict or judgment notwithstanding the verdict should have been granted in his favor. We disagree. While ordinarily a parent is not liable for the torts of his minor child, *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), a parent may be liable for his independent negligence if he permits his child to possess a dangerous instrumentality or one that becomes dangerous because of a child's immaturity or lack of judgment, such as an automobile, *Taylor v. Stewart*, 172 N.C. 203, 90 S.E. 134 (1916), or a forklift, *Anderson v. Butler*, *supra*.

In the case before us the evidence, considered as it must be in the light most favorable to the plaintiff, *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969), shows that the Honda Trail 50, a mini bike, ridden by the minor defendant was a "small motor-cycle," with a 49 cc gas-operated engine, an automatic three-speed

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transmission, and a seat that could carry more than one. A jury could find that such a vehicle becomes a dangerous instrumentality when entrusted to a child who lacks judgment or is immature.

Moreover, we find that there was sufficient evidence to permit the jury to find that the adult defendant had negligently entrusted the vehicle to his minor son. There is evidence that the motor bike was a gift from defendant to his 12-year-old son, that defendant knew that his son had ridden it many times in the yard, that defendant was aware that his son is "below average compared to a normal child," that defendant had showed his son how to operate the bike but had given him no instructions in safety or the rules of the road, that defendant "did not keep the key or lock the bike" and that the key was left on a cabinet in the house "with no one responsible really." After the collision defendant told the plaintiff's father that "he would not let [Bobby] ride on the street anymore." We find that this is evidence of independent negligence by the adult defendant sufficient to avoid a directed verdict and take the case to the jury.

No error.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. DONALD LAUGHINGHOUSE

No. 783SC915

(Filed 6 February 1979)

1. Receiving Stolen Goods § 5.1— sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for feloniously receiving a stolen CB radio and microwave oven.

2. Criminal Law § 111.1— reading indictment during jury charge—no violation of statute

The trial judge did not violate G.S. 15A-1213 by reading a portion of the indictment to the jury as a part of his charge after the close of the evidence, although the statute provides that "the judge may not read the pleadings to the jury," since the purpose of the statute, when read as a whole and considered with the Official Commentary, is to avoid giving jurors "a distorted view of the case" through the "stilted language of indictments," and jurors

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would not be given a distorted view of the case by a mere reiteration of the charge couched in the words of the indictment after they had heard all the evidence.

3. Receiving Stolen Goods § 6— instructions on intent

The trial judge sufficiently instructed the jury on the intent necessary to support a conviction of feloniously receiving stolen goods, although he failed to use the words "felonious intent," where he defined such intent as "the intent to convert property to [defendant's] own use or deprive the owner of its use permanently" and as a "dishonest purpose."

4. Criminal Law § 86.7— prior misconduct—adequacy of limiting instruction—failure to object to evidence

Defendant cannot now complain of the adequacy of a limiting instruction given with regard to a prior act of misconduct by defendant where he failed to object to the admission of the evidence or to request a limiting instruction.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 24 May 1978 in Superior Court, CRAVEN County. Heard in the Court of Appeals 19 January 1979.

Defendant was indicted for feloniously receiving stolen property, a CB radio and a microwave oven, under G.S. 14-71.

The State presented evidence that on 12 December 1977 James Nipper and Charlie Wiggins stole the property from a residence and stored it in a barn. Then they went into town to a poolroom where Nipper saw defendant and asked him if he wanted to buy some goods that they had gotten from "far off." The next day defendant bought the radio from them for \$10 and ten hits of speed at a meeting arranged for after dark on a deserted road. Nipper testified "I told [defendant] that I didn't want to be flashing no hot stuff around in [town]." Defendant asked them to bring the oven to his trailer, where his wife paid them \$40 for it. Defendant told them that if the law apprehended them, to say they sold the stuff to someone on the street in town, passing through. Nipper and Wiggins later confessed to taking the oven and radio and selling them to defendant, and Nipper stated that in his opinion defendant knew the goods were stolen. Nipper also testified that he earlier had sold defendant a stolen adding machine. When the Sheriff found the property in defendant's trailer, defendant told him that Nipper and Wiggins had pawned the stuff to him.

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The defendant presented no evidence. He was found guilty, sentenced to 10 years and ordered to pay \$2,000 and costs. He appeals.

Attorney General Edmisten, by Associate Attorney Benjamin G. Alford, for the State.

Beaman, Kellum, Mills and Kafer, by David P. Voerman, for defendant appellant.

ARNOLD, Judge.

[1] There is no merit in defendant's contention that he was entitled to a judgment as of nonsuit. The evidence, considered as it must be in the light most favorable to the State, see generally 4 Strong's N.C. Index 3d, Criminal Law § 104, is clearly sufficient to establish each essential element of the offense and to support a conviction. Nonsuit was properly denied. *Id.* § 106.

[2] Defendant next contends that he was prejudiced by a violation of G.S. 15A-1213. That statute, entitled "Informing prospective jurors of case," instructs the judge to briefly inform prospective jurors about the case, and concludes: "The judge may not read the pleadings to the jury." In the case *sub judice* the trial court read a portion of the indictment to the jury as part of his charge to them after the close of the evidence.

Now this is the case of the *State of North Carolina v. Donald Laughinghouse*, a criminal proceeding wherein the [defendant stands charged in the bill of indictment that "on or about the 12th day of December, 1977, in Craven County, that he, Donald Laughinghouse unlawfully and wilfully did feloniously receive one 23 Channel radio and one microwave oven, the personal property of Joyce French Howell, having a value of Six Hundred (\$600.00) dollars, knowing that the property to have been feloniously taken, stolen or carried away."]

Why the legislature would specify that "the judge may not read the pleadings to the jury" is not clear. The purpose of the statute, when read as a whole and considered together with the Official Commentary, apparently is to avoid giving jurors "a distorted view of the case" through the "stilted language of indictments." Official Commentary to G.S. 15A-1221, referring also to G.S. 15A-1213. Since finding a violation of the statute here

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would in no way serve that purpose we find no such violation. The jurors had heard all of the evidence, and to infer that they would be given a distorted view of the case by a mere reiteration of the charge couched in the words of the indictment would be illogical.

[3] Defendant next argues that the charge to the jury was improper because the judge failed to instruct the jury that the receiving of stolen property must be with "felonious intent." This Court has already recognized that there are other words which describe the requisite intent as adequately as the word "felonious" does. *State v. Ingram*, 10 N.C. App. 709, 179 S.E. 2d 814 (1971). The judge here defined the necessary intent as "[t]he intent to convert property to [defendant's] own use or deprive the owner of its use permanently." This definition is correct and we find it sufficient. We note, in addition, that the phrase used by the judge to denote the necessary intent was "dishonest purpose," a phrase much like "dishonest motive," which has been used by our Supreme Court in stating the required intent. See *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968).

[4] Error is also assigned to the alleged inadequacy of the limiting instruction given with regard to evidence of a prior act of misconduct on the part of defendant. However, defendant failed to object to the admission of the evidence, or to request a limiting instruction, so he was not entitled to such an instruction, 4 Strong's N.C. Index 3d, Criminal Law § 95.1, and he cannot now complain of the adequacy of the instruction given.

We find that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and WEBB concur.

State v. Byrd

STATE OF NORTH CAROLINA v. LAWRENCE RAYE BYRD

No. 7810SC807

(Filed 6 February 1979)

1. Criminal Law § 76.10— voluntariness of inculpatory statements—findings of court supported by evidence

Evidence was sufficient to support the trial court's findings and conclusion that defendant voluntarily and understandingly made inculpatory statements to police officers during custodial interrogation.

2. Criminal Law § 131.1— new trial for newly discovered evidence—discretion of trial court

Defendant failed to show an abuse of discretion in the trial court's denial of his motion for a new trial on the ground of newly discovered evidence consisting of a psychological evaluation of defendant.

APPEAL by defendant from *Brewer, Judge*. Order entered 7 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 9 January 1979.

Defendant was tried on charges of incest. As part of its case in chief, the State offered testimony of police officers concerning inculpatory statements made by defendant during custodial interrogation. After a voir dire hearing, the court ruled this evidence inadmissible, finding that although defendant had been fully advised of his *Miranda* rights, he was "not then of such mental capacity to fully understand" that he had the right to request assistance of an attorney. Defendant testified and denied guilt. He was cross-examined about the statements he had made to the officers, but denied making any statement implying guilt. In rebuttal, the State presented evidence of his statements for purposes of impeachment. He was convicted and appealed.

On appeal, this Court, citing *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) and *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. den.*, 409 U.S. 995, 34 L.Ed. 2d 259, 93 S.Ct. 328 (1972), held that the evidence concerning defendant's statements was admissible for the purpose of impeaching his credibility provided the statements were found to have been voluntarily made. There having been no such finding, the cause was remanded to the Superior Court with instructions to conduct a hearing to determine whether the statements were voluntarily

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and understandingly made. This Court further instructed that "[i]f the presiding judge determines by the preponderance of the evidence that the statement of the defendant was made voluntarily and understandingly, he will make findings of fact and conclusions, and order commitment to issue in accordance with the judgment appealed from and entered on 28 March 1977." *State v. Byrd*, 35 N.C. App. 42, 47, 240 S.E. 2d 494, 497 (1978).

On remand the Superior Court granted defendant's motion that he be given an intelligence quotient test and such other tests as might provide evidence of his mental capacity at the time he was interrogated. The testing and examination of defendant was made on 28 February 1978 by Dr. Bruce A. Norton, an expert in Clinical Psychology.

The hearing on remand was held on 7 April 1978. The trial court determined that defendant's statement was knowingly and understandingly made and ordered that commitment should issue. The defendant moved for a new trial for newly discovered evidence, in this connection referring to the testimony of Dr. Norton concerning his evaluation of defendant's mental capacity. Defendant also moved that he be allowed to plead not guilty by reason of insanity. These motions were denied. From these rulings, the defendant appeals.

Attorney General Edmisten by Assistant Attorney General Donald W. Grimes for the State.

Barringer and Howard by Thomas L. Barringer for the defendant.

PARKER, Judge.

[1] After hearing testimony of the two interrogating officers, of the defendant, and of the Clinical Psychologist who tested and examined the defendant, the court entered its order in which it made detailed and extensive findings of fact, including the following:

18. The defendant's statement resulted from his voluntary choice to make a statement in response to the questions of the officers, understanding that at the time he made the statement the nature and import of what he was doing by making a statement.

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Based on its findings of fact, the court concluded that defendant's statement to the officers was knowingly and understandingly made. There was competent evidence to support the court's factual findings and these in turn support its conclusion.

Although defendant's testimony conflicted with that of the officers as to what occurred at the time defendant's inculpatory statements were made, it was the function of the trial judge, who heard the testimony, to resolve these conflicts. "A trial judge's finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence." *State v. Harris*, 290 N.C. 681, 693, 228 S.E. 2d 437, 444 (1976). We note that the evidence in the present case was very different from that which was presented in *State v. Spence*, 36 N.C. App. 627, 244 S.E. 2d 442 (1978). Defendant's assignments of error directed to the court's findings and conclusions that defendant's statements were voluntarily and understandingly made are overruled.

[2] Defendant assigns error to the denial of his motion for a new trial on the ground of newly discovered evidence. "[A] motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and the refusal to grant the motion is not reviewable in the absence of abuse of discretion." *State v. Sauls*, 291 N.C. 253, 262-3, 230 S.E. 2d 390, 396 (1976), *cert. den.*, 431 U.S. 916, 53 L.Ed. 2d 226, 97 S.Ct. 2178 (1977); *accord*, *State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965); 4 Strong's N.C. Index 3rd, Criminal Law, § 131.1, p. 677-8. No abuse of discretion has been shown in the present case. This assignment of error is overruled.

In overruling this assignment of error, we do not reach or express an opinion on the questions (1) whether evidence of the psychological evaluation of the defendant obtained after verdict was such newly discovered evidence as would warrant granting a new trial, (2) whether defendant could make the requisite showing of due diligence in discovering the evidence, or (3) whether defendant waived any right he might once have had to rely on the defense of insanity by failing to avail himself of the procedures provided by G.S. 15A-959 and by not raising the question at all until after the return of the verdict.

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The order appealed from directing that commitment issue on the judgment imposed on 28 March 1977 is

Affirmed.

Judges ARNOLD and WEBB concur.

ROBERT E. COWART v. C. J. WHITLEY, NOLA B. WHITLEY, AND WHITLEY & SON, INC.

No. 7820SC117

(Filed 6 February 1979)

1. Limitation of Actions § 8.1— action based on fraud—when statute begins to run

The three-year period of limitation for an action to set aside a conveyance allegedly made to defraud creditors begins to run when the fraud is known or should have been discovered in the exercise of ordinary diligence.

2. Limitation of Actions § 8.2— fraudulent conveyance—notice of facts—jury question

In an action instituted in July 1976 to set aside a 1970 conveyance allegedly made to defraud creditors, the evidence presented a jury question as to whether plaintiff should have discovered the alleged fraud more than three years prior to the time the suit was instituted.

3. Limitation of Actions § 8.2— fraudulent conveyance—notice—registration of deed

The mere registration of a deed allegedly made to defraud creditors is insufficient to start the running of the statute of limitations on a claim to set aside the deed.

APPEAL by plaintiff from *McConnell, Judge*. Judgment entered 7 October 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 26 October 1978.

This is an action to set aside a conveyance of land that was allegedly made with intent to defraud creditors. The suit was instituted on 6 July 1976.

Plaintiff's evidence, in part, tends to show the following. In July, 1969, C. J. Whitley and wife, Nola B. Whitley, residents of Stanly County, executed a note to plaintiff, a resident of Mecklen-

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burg County, promising to repay \$15,000 in one year. In March, 1970, the Whitleys transferred all of their property, including the real estate that is the subject of this suit to Whitley & Son, Inc., a family corporation formed by C. J. Whitley for the purpose of taking title to the property. C. J. Whitley, as president of the corporation, subsequently sold part of the property and used the proceeds to pay some of his personal debts. C. J. and Nola Whitley continued to live on part of the property, as they did before title to the land was placed in the name of the corporation. There was other evidence tending to support plaintiff's allegation of fraud. No part of the debt to plaintiff has been paid.

On 4 April 1973, plaintiff obtained a judgment (filed 13 April 1973) against the Whitleys for the full amount due on the note and another debt due plaintiff by C. J. Whitley individually, together with interest from July, 1969 and costs. The judgment was entered by consent of the parties. At that time plaintiff agreed to deduct \$5,000 if the Whitleys satisfied the rest of the judgment within 90 days. He also agreed to withhold execution of the judgment for that period. Nothing was paid and execution was issued on 5 November 1973. The Sheriff could find no property upon which to levy, and the execution was returned unsatisfied on 4 February 1974. Plaintiff did not learn that the Whitleys had transferred the title to the land until May, 1976.

Defendants moved for a directed verdict at the close of plaintiff's evidence. The motion was made on the grounds that the action was barred by the statute of limitations. That motion was denied. Defendants then offered evidence tending to show that plaintiff was aware that the Whitleys had disposed of the property as early as 1970. Defendants' motion for a directed verdict, made at the close of all the evidence, on the grounds that the claim was barred by the statute of limitations was allowed. The court also ordered plaintiff's notice of Lis Pendens to be cancelled. Plaintiff appealed.

James, McElroy & Diehl, by James H. Abrams, Jr., for plaintiff appellant.

Coble, Morton, Grigg & Odom, by David L. Grigg, for defendant appellee.

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VAUGHN, Judge.

The judgment must be reversed unless the evidence discloses that, as a matter of law, plaintiff's claim is barred by the statute of limitations. Any contradictions in the evidence must be resolved in favor of plaintiff on defendants' motion for a directed verdict.

[1] The action was brought, pursuant to G.S. 39-15, to set aside the conveyance made in March of 1970 on the grounds of fraud. The action is subject, therefore, to a three-year statute of limitation. The cause of action, however, "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." G.S. 1-52(9). This statute is to be interpreted as meaning that the period of limitation begins to run when the fraud is known or should have been discovered in the exercise of ordinary diligence. *Ewbank v. Lyman*, 170 N.C. 505, 87 S.E. 348 (1915); *Peacock v. Barnes*, 142 N.C. 215, 55 S.E. 99 (1906). As stated by Chief Justice Stacy, "[a] party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests." *Blankenship v. English*, 222 N.C. 91, 92, 21 S.E. 2d 891, 892 (1942).

[2, 3] There is clearly a factual controversy as to when plaintiff had actual knowledge of the allegedly fraudulent conveyance. Plaintiff says it was in May of 1976, while defendants say it was in 1970. Obviously the directed verdict could not have been entered on the basis of actual knowledge by plaintiff. The next question, therefore, is whether the evidence compels the conclusion that plaintiff, as a matter of law, should have discovered the fraud more than three years prior to the time this suit was started. Consideration of that question, of course, requires that the evidence be considered in the light most favorable to plaintiff. When the evidence is viewed in that light, we conclude that it presented a factual question for resolution by the jury. Under the facts of this case, the mere registration of the deed to the defendant corporation cannot be said to be sufficient to start the running of the statute of limitations on plaintiff's claim. *Elliott v. Goss*, 250 N.C. 185, 108 S.E. 2d 475 (1959); *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951); *Tuttle v. Tuttle*, 146 N.C. 484, 59 S.E.

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1008 (1907). Whether there are other circumstances that should have put plaintiff on notice, prior to the return of the execution indicating that the Whitleys had no property upon which to levy, is a question for resolution by the trier of fact.

The judge also erred when he ordered that the notice of Lis Pendens be cancelled. The statute provides that, upon proper application, the court may cancel the Lis Pendens after the action "is settled, discontinued or abated." G.S. 1-120. The result of plaintiff's timely appeal is that his litigation is still pending.

Reversed.

Judges MARTIN (Robert M.) and MITCHELL concur.

JOHN PATRICK McANINCH v. SEMA JO BOSCIA McANINCH

No. 7824DC684

(Filed 6 February 1979)

Divorce and Alimony § 26.1— child custody—Florida decree not entitled to full faith and credit

A Florida decree awarding custody of a child to defendant mother was not entitled to full faith and credit where the child in question was not in the state of Florida when the decree was entered and the court did not have jurisdiction over the person of the child's father; therefore, in a child custody action instituted by plaintiff father in N. C., the trial court erred in concluding that it had no jurisdiction to conduct an inquiry and award custody of the child, who was present in the courtroom along with both parents who were represented by counsel.

APPEAL by plaintiff from *Lacey, Judge*. Judgment entered 23 February 1978 in District Court, WATAUGA County. Heard in the Court of Appeals 15 November 1978.

Plaintiff instituted this action for custody of his minor child on 2 December 1977. Defendant filed answer and was present at the hearing. The child was also present. Plaintiff and the defendant separated in September, 1976, and defendant moved from the home of the parties in Boone, North Carolina to Florida. On 19 April 1977, the defendant filed a "Petition For Dissolution Of

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Marriage" in Dade County, Florida. The prayer for relief also asked for custody of the child. Constructive service of the action on the plaintiff here was by publication in a Florida newspaper, and a copy of the "Notice For Dissolution Of Marriage" was mailed to him. The plaintiff was never personally served and never appeared in the Florida action. On 16 May 1977, he went to Florida and returned to North Carolina with the child, who had been in plaintiff's custody since that date. The Florida court entered a "Judgment Of Dissolution Of Marriage" on 28 June 1977, granting a divorce and awarding custody of the child to the mother. There were no findings of fact or conclusions of law with respect to the custody question. The court merely declared that "petitioner be and is hereby awarded custody of the minor child of the parties." The child was in North Carolina at the time of the hearing and order.

The trial judge concluded that the Florida judgment was entitled to full faith and credit and that, absent a substantial change of circumstances, "this court is without jurisdiction to enter an order modifying the same." In the next paragraphs the judge concluded that he did have jurisdiction but would decline to exercise it. He then repeated his earlier conclusion that his court was without jurisdiction and dismissed the action.

Clement & Miller, by Charles E. Clement, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by A. Marshall Basinger II, for defendant appellee.

VAUGHN, Judge.

The judge was in error when he concluded that the Full Faith and Credit Clause of the Constitution of the United States deprived the North Carolina court of jurisdiction to consider plaintiff's action for custody of his minor child. The almost identical question was decided in *May v. Anderson*, 345 U.S. 528 (1953). In *May*, the husband, wife and children lived in Wisconsin. Upon reaching a decision to separate, the wife took the children and moved to Ohio. The husband obtained a divorce and custody of the children in a Wisconsin proceeding. The only service of process upon the wife was the delivery to her in Ohio of a copy of the summons and petition. She took no part in the Wisconsin suit.

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Armed with his decree, the husband filed a *habeas corpus* petition in Ohio seeking to determine who had the right to immediate custody of the children. The issue addressed by the Supreme Court was "whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*." *May v. Anderson, supra*, at 533. Finding that the right to custody is more important than a property right, the Supreme Court reversed the Ohio court's ruling that it was required by the Full Faith and Credit Clause to accept the Wisconsin decree as binding. The Court stated, "[I]t is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound." *Baker v. Baker, E. & Co.* 242 US 394, 401" *May v. Anderson, supra*, at 533.

The North Carolina Supreme Court followed *May* in *Lennon v. Lennon*, 252 N.C. 659, 114 S.E. 2d 571 (1960), where the husband took the children to Nevada and obtained a divorce and custody decree. The court had no *in personam* jurisdiction over the wife. Later the children returned to North Carolina. In a *habeas corpus* proceeding, their mother sought to determine her right to custody. The trial court awarded custody to the mother. Our Supreme Court affirmed, citing *May*, saying that since Nevada did not have *in personam* jurisdiction over the mother, North Carolina did not have to give full faith and credit to the Nevada decree. The same principle was recited in *Fleek v. Fleek*, 270 N.C. 736, 155 S.E. 2d 290 (1967). We also note that the Supreme Court of North Carolina has said, "The Supreme Court of the United States, however, has not yet declared in positive terms that the provisions of a foreign divorce decree relating to custody are entitled to full faith and credit where the divorce court had jurisdiction in personam of both spouses or of both parties and the child." *Spence v. Durham*, 283 N.C. 671, 683, 198 S.E. 2d 537 (1973), *cert. den.*, 415 U.S. 918 (1974). The Court raised but declined to answer the question of "whether a consent judgment fixing custody, rendered by the court of a sister state which failed to conduct adversary proceedings and inquire into the cir-

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cumstances affecting the child, is entitled to full faith and credit." *Spence v. Durham, supra*, at 684.

In the case at bar, it is manifest that the Florida court has not conducted an adversary hearing on the question of the custody of the child. If, indeed, any evidence was received respecting custody, it is not reflected in the judgment. The judgment does not contain a single finding of fact or conclusion of law on that question. The child was not in the State of Florida when the decree was entered, and the court did not have jurisdiction over the person of the child's father. Under these circumstances the courts of North Carolina have the right to conduct an appropriate inquiry and enter such order as is deemed to be in the best interests of the child. Both of the parents were present and represented by counsel. The child was there. The "best interests of the child and the parties" clearly required that the court exercise its jurisdiction. We believe that the court's decision not to exercise its jurisdiction was impelled by its erroneous conclusion that it had no jurisdiction.

The judgment is reversed, and the case is remanded for a new trial.

Reversed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. SAMUEL PETE TANNER

No. 7810SC806

(Filed 6 February 1979)

Weapons and Firearms § 2— statute prohibiting possession of firearms by convicted felons—constitutionality

The statute prohibiting the possession of a firearm by persons convicted of certain felonies, G.S. 14-415.1, is not unconstitutionally vague, since it clearly delineates those to whom it applies and the classes of conduct proscribed. Nor does the statute create unconstitutional classifications because it denies the right to possess firearms to those convicted of certain felonies but not all felonies or because it allows the right of possession to some persons convicted of the same felonies due to the length of their sentences, probation and parole.

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APPEAL by defendant from *McLelland, Judge*. Judgment entered 6 June 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 9 January 1979.

Defendant, a convicted felon, was indicted for possession of a firearm in violation of G.S. 14-415.1. He moved to dismiss on the ground that the statute under which he was charged was unconstitutionally vague, arbitrary and discriminatory. This motion was denied.

The State presented evidence that on 3 March 1978 Officer Brin of the Raleigh Police Department witnessed a collision between defendant's vehicle and another vehicle. Brin arrested the defendant for driving under the influence and for driving without an operator's license. Brin read the defendant his rights, and "his first statement was what I was going to do about his gun. At that time I did not know anything about a weapon; he said he had a gun in his vehicle." Brin found a .38 caliber pistol in a brown paper bag on the front seat of the vehicle; the gun was cocked and loaded.

Excerpts from the court minutes read to the jury showed that on 8 March 1968 defendant was sentenced to 30 years, having pled guilty to second degree murder. Defendant was released on parole in 1972 and his parole was terminated in 1977, restoring his rights of citizenship except for his right to own or possess a firearm.

Defendant presented the testimony of several witnesses that on 3 March, the day of his arrest, he was moving his possessions to another house. He did own a gun, given to him by a relative.

Defendant was found guilty and sentenced to two years. He appeals.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Vaughan S. Winborne for defendant appellant.

ARNOLD, Judge.

We find no merit in defendant's assignments of error going to the conduct of his trial. Thus we address only his contention that the statute under which he was convicted is unconstitutional.

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G.S. 14-415.1 provides in pertinent part:

(a) It shall be unlawful for any person who has been convicted of [certain felonies, including second degree murder] to purchase, own, possess, or have in his custody, care, or control any handgun . . . within five years from the . . . termination of . . . parole.

Every person violating the provisions of this section shall be guilty of a felony. . . .

Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

We find, first of all, that this statute is not unconstitutionally vague. It clearly delineates those to whom it applies and the classes of conduct proscribed, so that a person of ordinary intelligence may be apprised of the conduct forbidden. See *State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973).

Next, defendant advances three arguments that the statute's classifications are unconstitutional: (1) it denies the right to possess firearms to those convicted of certain felonies but not all felonies; (2) it allows the right of possession to some felons in the prohibited class due to the length of their sentences, probation and parole; and (3) it allows a convicted felon to possess a firearm in his home or place of business but does not provide a way for him to get the firearm there. We find no merit in these contentions.

Both the United States and the North Carolina Constitutions allow the State to classify persons and activities when there is a reasonable basis for such classification. See generally 3 Strong's N.C. Index 3d, Constitutional Law § 20. Our legislature has decided that those convicted of certain felonies will be brought within the restriction of G.S. 14-415.1. Defendant's earlier conviction was for second degree murder, a crime of violence. We see no constitutional difficulty with this classification scheme as applied to defendant, since there is clearly a reasonable relation between the classification, those convicted of a crime of violence, and the purpose of the statute, protection of the people from violence. The equal protection clauses do not require perfect classification. *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972).

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Nor do we find the statute invalid because the restriction applies during the five years after conviction, discharge from a correctional institution, or termination of a suspended sentence, probation or parole, whichever is later. G.S. 14-415.1(a). This merely establishes a class, those convicted of the enumerated crimes who are within five years of the end of their punishment, and the law applies uniformly to all members of the class affected.

Defendant's third argument is frivolous. We find no constitutional infirmities in the application of this statute to this defendant, and no prejudicial error in his trial.

No error.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. MARVIN JUNIOR LOCKLEAR

No. 7816SC852

(Filed 6 February 1979)

Criminal Law § 163; Homicide §§ 24.2, 24.3—alleged errors in instructions—failure to object at trial or on appeal

In a prosecution for second degree murder where the judge instructed the jury that the burden was on defendant to disprove malice to reduce the killing to voluntary manslaughter and that the burden was on defendant to prove that he killed in self-defense, defendant could not, for the first time, seek collateral review of these alleged errors in the judge's charge that took place during his trial in August 1974 when he failed to raise the question at trial, on direct appeal or in a subsequent petition for post-conviction relief.

ON *certiorari* to review order entered by *Hobgood, Judge*. Order entered 16 January 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals 11 January 1979.

Defendant was convicted of second degree murder during the 8 August 1974 Session of the Superior Court of Robeson County. At that trial, the judge, among other things, instructed the jury that the burden was on defendant to disprove malice to reduce the killing to voluntary manslaughter and that the burden was on defendant to prove that he killed in self-defense. Defendant, in the preparation of the record on appeal, set out exceptions and

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assignments of error to those portions of the charge. On appeal, however, defendant failed to bring forward or argue any assignments of error. He was represented by privately retained counsel. In his brief, the appellant stated to this Court that he could make no legitimate assignments of error or advance any contentions that would entitle defendant to a new trial. This Court affirmed his conviction on 5 March 1975 in the following language.

“An exception to the judgment presents the face of the record for review. Neither defense counsel nor the Attorney General has been able to find any prejudicial error in the trial. Evidence for the State included several witnesses who saw defendant shoot James Bartley. We have carefully examined the record and find no error.” *State v. Locklear*, 25 N.C. App. 116, 212 S.E. 2d 406 (1975).

On 16 June 1975, defendant petitioned for post-conviction relief which was denied on 19 June 1975. Defendant did not suggest that there were errors in the charge to the jury. This Court denied certiorari on 21 July 1975.

Defendant filed a petition for a writ of habeas corpus on 11 October 1977 alleging that the trial court improperly placed the burden of disproving malice and proving self-defense on the defendant. Judge Hobgood found that the charge violated the concept of due process as established in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and applied in North Carolina in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975). Since *Hankerson v. North Carolina*, 432 U.S. 233 (1977) gave *Mullaney* retroactive effect, Judge Hobgood ordered a new trial on 16 January 1978. From this order, we have allowed the State's petition for certiorari.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Britt and Britt, by Evander M. Britt, for defendant appellee.

VAUGHN, Judge.

The question is whether defendant may now, for the first time, seek collateral review of an alleged error in the judge's charge that took place during his trial in August, 1974, when he failed to raise the question at trial, on direct appeal or in a subse-

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quent petition for post-conviction relief. Defendant, of course, relies on *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Hankerson v. North Carolina*, 432 U.S. 233 (1977). In *Hankerson*, however, the Supreme Court of the United States noted:

"[I]t is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. . . . The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U.S. at 244 n. 8.

At the time defendant was tried (as well as under our current Rules of Appellate Procedure) a defendant waived the right to claim error in the charge unless he presented the questions for review in an appeal where the exceptions were noted, included in an assignment of error, and brought forward and argued in his brief. Following the decision in *Hankerson*, our courts have consistently held that a defendant who failed to raise the alleged error on direct appeal will be held to have waived his right to complain about the error. *State v. Riddick*, 293 N.C. 261, 247 S.E. 2d 234 (1977); *State v. Jackson*, 293 N.C. 260, 247 S.E. 2d 234 (1977); *State v. Brower and Johnson*, 293 N.C. 259, 243 S.E. 2d 143 (1977); *State v. Watson*, 37 N.C. App. 399, 246 S.E. 2d 25 (1978); *State v. Abernathy*, 36 N.C. App. 527, 244 S.E. 2d 696 (1978).

It is of no consequence that defendant's counsel, in the preparation of the record on appeal, set out assignments of error to the judge's charge. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28, Rules of Practice in the Court of Appeals of North Carolina. (Superseded as of 1 July 1975.) Substantially the same provision may be found in the current rules. Rule 28, North Carolina Rules of Appellate Procedure. Under the former practice, however, the appeal itself was considered an exception to the judgment and presented the "face of the record proper" for review. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). That review considered such matters as "the sufficiency of the indictment, subject matter jurisdiction, and regularity of the judgment." *State v. McMorris*, 290 N.C. 286, 292, 225 S.E. 2d 553, 557 (1976). Defendant's appeal was taken prior to the adoption of

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the new Rules of Appellate Procedure. This Court, consequently, reviewed the "face of the record" even though defendant and his privately retained counsel had abandoned all assignments of error. *State v. Locklear, supra*. The judge's charge, however, has never been considered as appearing on the face of the record proper. It was no more presented for review than, for example, the judge's rulings on evidentiary matters. Defendant's failure to "make appropriate objections to jury instructions" on his appeal is a waiver of any subsequent "claim of error." *Hankerson v. North Carolina, supra*; *State v. Riddick, supra*.

The order under review is in error. It is reversed and vacated. The case is remanded to the Superior Court of Robeson County.

Reversed and remanded.

Judges HEDRICK and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES FREDDIE FUTRELL

No. 7810SC818

(Filed 6 February 1979)

Narcotics § 1.1— constitutionality of Toxic Vapors Act

The North Carolina Toxic Vapors Act, G.S. 90-113.8A *et seq.*, which prohibits the intentional inhalation of toxic vapors for the purpose of causing certain conditions, is not void for vagueness in failing to define the conditions of "intoxication, inebriation, excitement, stupefaction, or the dulling of his brain or nervous system" or in failing to limit by definition the types of proscribed toxic vapors.

APPEAL by the State from *Preston, Judge*. Judgment entered 5 July 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 9 January 1979.

This is an appeal from an order declaring the North Carolina Toxic Vapors Act (G.S., Chap. 90, Art. 5A) unconstitutional for vagueness.

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The defendant was indicted for possession of one-half gallon of paint thinner (Toluol) for the purpose of selling or offering to sell it in violation of G.S. 90-113.11 and for the purpose of inhaling it in violation of G.S. 90-113.9. Upon the defendant's motion to dismiss, the court found this statute violated the Due Process Clause of the United States Constitution and the North Carolina Constitution, art. 1, § 19 on the grounds that: (1) the statute failed to define with specificity "a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain, or nervous system"; (2) the statute failed to define Toluol as a toxic vapor; and (3) the statute was devoid of standards or procedures to establish any of the proscribed conditions.

The court dismissed the charges against the defendant.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

Allen and Pinnix, by John L. Pinnix, for defendant appellee.

WEBB, Judge.

G.S. 90-113.9 provides:

No person shall, for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain, or nervous system, intentionally smell or inhale the fumes from any substance having the property of releasing toxic vapors or fumes; provided, that nothing in this section shall be interpreted as applying to the inhalation of any anesthesia for medical or dental purposes.

G.S. 90-113.11 prohibits offering to sell or the sale of any substance for the purpose of violating G.S. 90-113.9.

The test of whether a statute is too vague and indefinite to meet the requirements of due process is stated in *United States v. Harris*, 347 U.S. 612, 617-18, 74 S.Ct. 808, 98 L.Ed. 989 (1954):

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

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On the other hand, if the general class of offense to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. (Citations omitted.) And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."

See also Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

We believe a person of ordinary intelligence who reads G.S. 90-113.9 can fairly understand that he or she is forbidden to smell or inhale fumes for the purpose of attaining any of the conditions described in the statute. Those conditions are "intoxication, inebriation, excitement, stupefaction, or the dulling of his brain, or nervous system." The defendant contends these terms are imprecise and subject to infinite interpretation. We believe persons of ordinary intelligence understand these words without further definition. They are used in series and we believe the ordinary man would know that in the vernacular they mean being "drunk, high or on a trip" and would know what is forbidden. We hold these words are not unconstitutionally vague.

The defendant also contends the statute is unconstitutional because it does not define toxic vapors. We do not believe any such definition is necessary. We believe it is clear to men of ordinary intelligence that they are forbidden from smelling with the intention of getting drunk or high, any vapors with the quality of causing the proscribed conditions. This is all the definition necessary to comply with the Constitution. We believe men of ordinary intelligence should have no difficulty understanding it. The defendant contends further that by not limiting by definition the types of proscribed toxic vapors the General Assembly has created a class so broad that the inhaling of steam in sufficient quantity, the smoking of tobacco, or the smelling of perfume could be covered by the statute. Indeed a similar statute was declared unconstitutional in Florida because the Supreme Court of Florida said tobacco smoking could be included in its proscription. *Linville v. State*, 359 S. 2d 450 (Fla. 1978). At its best, we would put this argument in the category described in *State v. Harriss*,

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supra, as marginal where a doubt might arise. It is the duty of this Court to give the statute a reasonable interpretation so that the class of offenses can be made constitutionally definite. Whatever may be said of steam, perfume or tobacco, we cannot hold that persons of ordinary intelligence would say they cause people to attain the condition prohibited by the statute.

For the reasons stated in this opinion, we hold the superior court erred in declaring unconstitutional the statute in question.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

JESSE W. ROSS v. ROBERT W. YELTON

No. 7827SC230

(Filed 6 February 1979)

Evidence § 44— mental anguish causing physical illness—expert testimony required

In an action to recover against the former attorney of a corporation who failed to file answers in two separate actions against the corporation, allowed default judgments to be taken against the corporation, and concealed from plaintiff and the corporation the fact that the default judgments had been entered, the trial court did not err in excluding testimony by plaintiff that his physical illness was caused by mental anguish he suffered as a result of his corporation's financial difficulties, since plaintiff was not a medical expert and no doctor or other qualified medical expert was offered to testify to this causation.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 15 November 1977 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 9 January 1979.

This appeal brings to the Court a question of evidence. The plaintiff filed a lawsuit against the defendant who had been the attorney for a corporation which was wholly owned by the plaintiff. The corporation also sued the defendant and the two actions were consolidated for trial and tried at the 11 April 1977 term. The individual and corporate plaintiffs offered evidence that the

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defendant failed to file answers in two separate actions brought against the corporation, allowing default judgments to be taken against the corporation. The defendant concealed from his client the fact that default judgments had been taken and advised the plaintiff in this action that there was no defense to the actions, causing the corporation to pay \$15,627.03 in order to satisfy the judgments. Issues of negligence were answered favorably to the plaintiffs in both cases. The jury awarded the corporate plaintiff \$35,000.00 in damages including damages for loss of profits. The jury awarded \$10,000.00 in damages to the individual plaintiff and the court ordered a remittitur of this verdict to \$2,500.00 which the plaintiff refused to accept. The court then set aside the verdict as to damages in favor of the individual plaintiff. The judgment in favor of the corporation was paid. The damage issue in the individual plaintiff's case was then retried. At the second trial the plaintiff offered evidence by his own testimony and other witnesses as to the emotional distress he suffered as a result of the corporation's financial stress which caused a physical illness. The court excluded this testimony because none of the witnesses were qualified as medical experts. The jury, following the instructions of the court, awarded nominal damages.

Casey and Daly, by George Daly, for plaintiff appellant.

Whisnant, Lackey and Schweppe, by N. Dixon Lackey, Jr., for defendant appellee.

WEBB, Judge.

The principal question posed by this appeal is whether the superior court committed error by excluding testimony by the plaintiff that his physical illness was caused by the mental anguish he suffered as a result of his corporation's financial difficulties. No medical doctor or other qualified medical expert was offered to testify to this causation. If the cause of a physical illness is such that a layman could not competently form an opinion as to it, qualified medical testimony is essential. *See Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493 (1954), and *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57 (1951). We hold that in this case the cause of the plaintiff's physical illness by mental stress was such that only a qualified medical expert could testify as to his opinion of

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its cause. Judge Snapp properly excluded this testimony. Since there was no other evidence of damages we hold it was correct for the court to allow nominal damages only.

No error.

Judges PARKER and ARNOLD concur.

PATRICIA ANN SELF, BY HER GUARDIAN AD LITEM, CRAWFORD M. SELF v.
JERRY WAYNE DIXON

No. 7819SC339

(Filed 6 February 1979)

**Automobiles § 90.4— contributory negligence of pedestrian on street—no intent to
impede traffic—instructions erroneous**

In an action to recover for personal injuries sustained by plaintiff pedestrian when she was struck by defendant's vehicle, the trial court erred in submitting to the jury plaintiff's violation of G.S. 20-174.1 in instructing on the issue of contributory negligence, since there was not sufficient evidence tending to show that plaintiff wilfully placed herself on the street to impede or block traffic.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 30 November 1977 in Superior Court, CABARRUS County. Heard in the Court of Appeals 18 January 1979.

Plaintiff, age 14, seeks to recover for personal injuries sustained on 30 July 1975 when she was struck by an automobile owned and operated by defendant. The defendant's answer denied negligence and alleged that the minor plaintiff was contributorily negligent.

At trial, the plaintiff presented evidence which tended to show that it was daylight and the weather was fair; she was pushing her niece in a stroller in a southerly direction on the west shoulder of Deaton Street in Kannapolis. She could not push the stroller on the east shoulder because it was narrow and rough. She stooped down to pick up a rag her niece had dropped in the road; she was facing west, "half on and half off the pavement." She saw defendant's vehicle enter the intersection, about 60 feet to the north, and turn south on Deaton Street. She didn't

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have time to stand up and get off the pavement before the car hit her.

The evidence for defendant tended to show that defendant was blinded by the sun as he turned south on Deaton Street and could not see the minor plaintiff until he was approximately 10 feet away. He was traveling approximately 5 miles per hour down Deaton Street.

The jury found that defendant was negligent and that the minor plaintiff was contributorily negligent and plaintiff appeals from the judgment entered in favor of defendant.

Koontz, Horton & Hawkins by K. Michael Koontz for plaintiff appellant.

Hedrick, Parham, Helms, Kellam & Feerick, by Hatcher Kincheloe for defendant appellee.

CLARK, Judge.

Defendant, in pleading contributory negligence, alleged that plaintiff violated various rules of the roads and statutes, including G.S. 20-174.1 which provides as follows:

"Standing, sitting or lying upon highways or streets prohibited. —(a) No person shall willfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic.

(b) Any person convicted of violating this section shall be punished by a fine not exceeding five hundred dollars (\$500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court."

In instructing the jury on the contributory negligence issue the trial court recited the statute and added: "Now, a violation of this law is negligence within itself."

The plaintiff assigns as error this instruction to the jury.

The language of G.S. 20-174.1 was construed in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), in which Justice Huskins, for the Court, wrote:

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"When G.S. 20-174.1 is subjected to these rules of construction, it is quite clear that the legislature intended to make it unlawful for any person to impede the regular flow of traffic upon the streets and highways of the State by willfully placing his body thereon in either a standing, lying or sitting position. A person may stand and walk, stand and strut, stand and run, or stand still. All these acts are condemned by the statute when done willfully in such manner as to impede the regular flow of traffic upon a public street or highway. . . ." 276 N.C. at 547, 173 S.E. 2d at 774.

In *Spencer* and other cases involving violations of G.S. 20-174.1, the evidence tended to show that the defendants were involved in demonstrations and purposely impeded or blocked traffic for a substantial amount of time. See, *State v. Frinks*, 22 N.C. App. 584, 207 S.E. 2d 380, *appeal dismissed* 285 N.C. 761, 209 S.E. 2d 285 (1974); *In re Shelton*, 5 N.C. App. 487, 168 S.E. 2d 695 (1969); *aff'd* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971); *In re Burrus*, 4 N.C. App. 523, 167 S.E. 2d 454, *modified* 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971).

In the case *sub judice* there is not sufficient evidence tending to show that plaintiff willfully placed her body on Deaton Street to impede or block traffic in violation of G.S. 20-174.1. Plaintiff testified that she stood "half on and half off" the pavement for the purpose of picking up the rag dropped by her niece and that she saw defendant's approaching automobile but was unable to get off the pavement before being struck. Defendant testified that upon turning south on Deaton Street he was blinded by the sun and did not see plaintiff until she was ten feet from him in a squatting position.

Since a new trial must be ordered for error in submitting to the jury plaintiff's violation of G.S. 20-174.1 in instructing on the contributory negligence issue, the other assignments of error are not discussed since they may not recur upon retrial.

Reversed and remanded for a new trial.

Judges VAUGHN and MARTIN (Harry C.) concur.

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J. J. SANSOM, JR., PLAINTIFF v. WILLIAM A. JOHNSON, CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MRS. HOWARD HOLDERNESS, VICE CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN HER OFFICIAL CAPACITY; DR. E. B. TURNER, SECRETARY OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; AND F. P. BODENHEIMER, PHILIP G. CARSON, LAURENCE A. COBB, T. WORTH COLTRANE, WAYNE A. CORPENING, MRS. KATHLEEN R. CROSBY, DR. HUGH DANIEL, JR., WILLIAM A. DEES, JR., CHARLES Z. FLACK, JR., JACOB H. FROELICH, JR., DANIEL C. GUNTER, JR., GEORGE WATTS HILL, LUTHER H. HODGES, JR., JAMES E. HOLMES, ROBERT L. "RODDY" JONES, JOHN R. JORDAN, MRS. JOHN L. MCCAIN, REGINALD MCCOY, WILLIAM D. MILLS, MRS. HUGH MORTON, J. AARON PREVOST, LOUIS T. RANDOLPH, HARVEY F. SHUFORD, JR., MACEO A. SLOAN, DAVID H. WHICHARD II, MRS. GEORGE D. WILSON, MEMBERS OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN THEIR OFFICIAL CAPACITY; AND THEIR SUCCESSORS IN OFFICE, DEFENDANTS

No. 7810SC55

(Filed 6 February 1979)

Colleges and Universities § 1; Public Officers § 5 — member of Banking Commission — prohibition against serving on U.N.C. Board of Governors

A member of the State Banking Commission is an "officer of the State" within the meaning of G.S. 116-7(b) and is prohibited by that statute from also serving on the Board of Governors of the University of North Carolina.

APPEAL by plaintiff from *McLelland*, Judge. Judgment entered 12 January 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1978.

In 1975, plaintiff was elected to the Board of Governors of the University of North Carolina for a six-year term. In October 1977, he was sworn in as a member of the State Banking Commission. On 12 December 1977, plaintiff received a letter from the defendant advising him that he was no longer eligible to serve on the Board of Governors because he was a member of the State Banking Commission and, therefore, was prohibited by G.S. 116-7(b) from occupying both offices. Plaintiff attempted to attend a meeting of the Board of Governors but was denied recognition. He then started this action for a declaratory judgment. He subsequently moved for a temporary restraining order and preliminary injunction to enjoin the defendant from excluding him from the meetings of the Board. From the denial of this motion, and the entry of a judgment concluding that a member of the State Banking

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Commission is an officer of the State under G.S. 116-7(b), plaintiff appealed.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Thigpen, Blue & Stephens, by Ralph L. Stephens, for plaintiff appellant.

VAUGHN, Judge.

We affirm the trial judge's decision that a member of the State Banking Commission is an "officer of the State" within the meaning of G.S. 116-7(b). That section provides:

"From and after July 1, 1973, no member of the General Assembly or officer or employee of the State or of any constituent institution or spouse of any such member, officer or employee may be a member of the Board of Governors. Any member of the Board of Governors who is elected or appointed to the General Assembly or who becomes an officer or employee of the State or of any constituent institution or whose spouse is elected or appointed to the General Assembly or becomes such officer or employee shall be deemed thereupon to resign from his membership on the Board of Governors."

In many of the cases concerning what persons are public officers, the discussion relates to the distinction between public "officers" and public "employees." For example, the Supreme Court recites that "[a]n essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *State v. Hord*, 264 N.C. 149, 155, 141 S.E. 2d 241 (1965); *State v. Smith*, 145 N.C. 476, 59 S.E. 649 (1907). In another case the Supreme Court explained:

"The office was created by the General Assembly and the duties imposed involve decisions as to property from which an appeal would lie. One who holds a public office is a public office holder. The absence of substantial compensation is immaterial. The following decisions of this Court support this view. *Harris v. Watson*, 201 N.C. 661, 161 S.E. 215; *Groves v. Barden*, 169 N.C. 8, 84 S.E. 1042; *Advisory Opinion in re*

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Phillips, 226 N.C. 772, 39 S.E. 2d 217; *Bryan v. Patrick*, 124 N.C. 651 (662), 33 S.E. 151; *S. v. Knight*, 169 N.C. 333, 85 S.E. 418; *Eliason v. Coleman*, 86 N.C. 235; *Clark v. Stanley*, 66 N.C. 59; 42 A.J. 880."

Harrington & Co. v. Renner, 236 N.C. 321, 327, 72 S.E. 2d 838 (1952).

Even the most cursory examination of the statutes creating and defining the duties of members of the State Banking Commission will assure the reader that members of that Commission are public officers. Plaintiff contends, however, that even if it be conceded that members of the Banking Commission are "public officers," they are not "officers of the State" within the meaning of the statute.

The Supreme Court has defined the term "State officers" so as to include those public officers "whose duties concern the State at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the State. They are in a general sense those whose powers and duties are coextensive with the State." *State v. Scott*, 182 N.C. 865, 871, 109 S.E. 789 (1921). The jurisdiction of the State Banking Commission is obviously statewide and, as the Supreme Court explained, "It is admitted that the jurisdiction of the board is statewide, and if the members are officers, they are, therefore, State officers." *State v. Scott*, *supra*, at 871.

We have carefully considered plaintiff's contentions with respect to G.S. 147-1 and G.S. 147-3. We conclude, however, that even if it could be conceded that these statutes are relevant to the questions presented, there is nothing in them that conflicts with the decision we have reached.

The statute, in plain language, provides that no state employee of any grade and no officer of the state (or the spouse of any such person) can also serve as a member of the Board of Governors of the University of North Carolina. Plaintiff, a member of the State Banking Commission, is an officer of the State who falls within that proscription.

The judgment is affirmed.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

State v. Prince

STATE OF NORTH CAROLINA v. BOBBY WADE PRINCE

No. 7810SC713

(Filed 6 February 1979)

Receiving Stolen Goods § 5.2— failure to show goods stolen by another

The trial court erred in failing to grant defendant's motion for nonsuit on a charge of feloniously receiving stolen goods where there was no evidence that the goods were stolen by someone other than the defendant and all the evidence, including defendant's possession of the goods soon after they were stolen, tended to show that defendant was the thief.

APPEAL by defendant from *Preston, Judge*. Judgment entered 17 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 15 November 1978.

Defendant was indicted for felonious breaking and entering with intent to commit larceny, felonious larceny and feloniously receiving stolen goods. The evidence at trial tends to show that sometime between 24 March 1978 and 30 March 1978, Swift Creek Elementary School was broken into and various items such as projectors, school keys and a television set were taken. On 25 March 1978, the defendant sold two of the stolen projectors and other property to Jim Underwood. On 31 March 1978, Underwood gave this property to the police. Some of the items were marked with the name, "Swift Creek." After he was arrested, the defendant told the police that the rest of the property was in a field owned by his father located about six tenths of a mile from the home of defendant's father. There was evidence that defendant lived at his father's home. The police recovered the property, including the school keys, from that field.

Defendant was acquitted of all the charges except that of feloniously receiving stolen goods. From his conviction on that charge, he appealed.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Purrington, Hatch & McNamara, by Edwin B. Hatch, for defendant appellant.

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VAUGHN, Judge.

Defendant contends that the trial court erred in failing to grant his motion for nonsuit on the charge of feloniously receiving stolen goods.

The elements of the crime of receiving stolen goods are “(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose.’” *State v. Muse*, 280 N.C. 31, 39, 185 S.E. 2d 214, 220 (1971), *cert. den.*, 406 U.S. 974 (1972) (quoting *State v. Neill*, 244 N.C. 252, 255, 93 S.E. 2d 155, 157 (1956)).

The motion for nonsuit should have been allowed. All the evidence, including defendant’s possession of the goods soon after they were stolen, tends to show that the defendant, and no one other than the defendant, was the thief. The crimes of larceny and receiving stolen goods, knowing them to have been stolen, however, are separate offenses and not degrees of the same offense. *State v. Brady*, 237 N.C. 675, 75 S.E. 2d 791 (1953). It is elementary that a person cannot be guilty both of stealing property and receiving the same property knowing it to have been stolen by someone else. *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

In summary, since there is no evidence that the goods were stolen by someone other than the defendant and all the evidence tends to show that defendant was the thief, there is no evidence to support the verdict. *State v. Neill*, *supra*; *State v. Burnette*, 22 N.C. App. 29, 205 S.E. 2d 357 (1974).

The judgment must be reversed.

Reversed.

Judges HEDRICK and ARNOLD concur.

State v. Hamilton

STATE OF NORTH CAROLINA v. LEE THOMAS HAMILTON

No. 7820SC918

(Filed 6 February 1979)

Rape § 6.1— second degree rape—instruction on assault on female improper—defendant not prejudiced

In a prosecution for second degree rape where all of the evidence of defendant showed there was a completed act of intercourse and the issue was whether there was consent, any error in the trial court's charge on assault on a female was not prejudicial to defendant since that charge should not have been submitted to the jury and any error was favorable to defendant.

APPEAL by defendant from *Walker (Hal H.)*, Judge. Judgment entered 16 May 1978 in Superior Court, UNION County. Heard in the Court of Appeals 19 January 1979.

The defendant appeals from a conviction of second degree rape. The State offered evidence sufficient to support a conviction of rape. The defendant testified he had intercourse with the prosecuting witness, but that it was with her consent. The court submitted to the jury charges of first and second degree rape, assault with intent to commit rape, and assault on a female.

Attorney General Edmisten, by Associate Attorney Tiare Smiley Farris, for the State.

Joe P. McCollum, Jr., for defendant appellant.

WEBB, Judge.

The defendant's only assignment of error pertains to the charge. He argues the court did not properly define assault on a female. In its charge concerning assault on a female, the court said that one of the things the State must prove is "that the defendant assaulted Patricia McClendon, that he at least laid his hands on her without her consent." Assuming this was error, we hold it did not harm the defendant. In this case all the evidence including the evidence of the defendant showed there was a completed act of intercourse. The issue was whether this intercourse was with the consent of the prosecuting witness. The charge of assault on a female should not have been submitted to the jury. *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, cert. denied, 409

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U.S. 995 (1972). It was error favorable to the defendant and we hold he was not prejudiced by this charge. *State v. Small*, 31 N.C. App. 556, 230 S.E. 2d 425 (1976).

No error.

Judges PARKER and ARNOLD concur.

CAROLINAS-VIRGINIAS ASSOCIATION OF BUILDING OWNERS AND MANAGERS, AN UNINCORPORATED ASSOCIATION v. HONORABLE JOHN RANDOLPH INGRAM, NORTH CAROLINA COMMISSIONER OF INSURANCE; KERN E. CHURCH, DEPUTY COMMISSIONER, DIVISION OF ENGINEERING, NORTH CAROLINA DEPARTMENT OF INSURANCE; THE NORTH CAROLINA BUILDING CODE COUNCIL; AND S. RAY MOORE, CHAIRMAN, T. L. WATSON, JR., VICE CHAIRMAN, AND JOHN R. ADAMS, R. GLENN AGNEW, JOHN R. ANDREW, FRANK WILLIAM BILLMIRE, MOODYE R. CLARY, JOHN H. EMERSON, C. B. GALPHIN, WALTER F. PERRY, AND EDWARD L. WOODS, MEMBERS OF THE NORTH CAROLINA BUILDING CODE COUNCIL

No. 7710SC899

(Filed 20 February 1979)

Administrative Law § 3; Constitutional Law § 13.1— State Building Code— authority of Building Code Council—requirements for existing buildings

The Legislature did not in G.S. 143-138(b) expressly or impliedly grant the State Building Code Council power to amend the State Building Code so as to impose new and more stringent requirements upon existing buildings which, prior to such amendment, fully complied with the Code and which are neither being altered nor changed in use.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 3 October 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 18 August 1978.

This is an appeal from summary judgment holding Section 1008 of the North Carolina Building Code invalid and unenforceable. The material facts, as established by verified pleadings, stipulations, and affidavits, are not in dispute.

The defendant, the North Carolina Building Code Council (the "Council"), is a State agency composed of eleven members ap-

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pointed by the Governor pursuant to G.S. 143-136(a). On 9 March 1976 the Council, by a vote of five to three, adopted Section 1008 as an amendment to the State Building Code. This section, entitled "Special Safety to Life Requirements Applicable to Existing High Rise Buildings," applies only to existing high rise buildings and imposes on these buildings a graduated series of requirements which, in general, increase in number and severity with the height classification of the building affected. Three height classifications are provided: buildings six floors or 60 feet or more in height up to 12 floors or 120 feet (Class I); those 12 floors or 120 feet in height up to 25 floors or 250 feet (Class II); and those 25 floors or 250 feet and taller. (Class III). Certain occupancies, such as hospitals and nursing homes, come under a higher classification at lower heights.

Sec. 1008 imposes fifteen separate requirements upon Class I buildings, twenty-six separate requirements upon Class II buildings, and forty-six separate requirements upon Class III buildings. In general, these relate to such matters as exit stairways, emergency elevators, automatic smoke detection devices, manual fire alarm systems, public address systems in Class II and III buildings, two-way voice communication systems in Class III buildings, two hour emergency electrical power for operation of emergency equipment (including, depending upon the building's classification, exit and elevator lighting, corridor and stair lighting, alarm and detection systems, pressurization fans, emergency elevator, and certain sprinkler systems), special requirements for the enclosure of vertical shafts, special requirements for elevators in Class II and III buildings, and, in Class III buildings, a control facility and areas of refuge requiring special construction, pressurization, and protected access corridors

The parties stipulated to the following:

1. Sec. 1008 of the North Carolina Building Code affects building owners of high rise buildings throughout North Carolina. It is known that at least 265 such buildings, not including State owned buildings, are affected, based upon information furnished by the Building Inspection Departments in 34 cities in North Carolina. It is also known that at least 70 State owned buildings are affected by Sec. 1008.

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2. Sec. 1008 generally imposes requirements additional to those required by law when the buildings subject thereto were originally constructed.

3. Based upon cost estimates furnished by the owners of 76 of the above 265 buildings, it is known that such building owners, if called upon to testify under oath, would testify that it would cost them, collectively, approximately \$10,769,724 to comply with Sec. 1008. Although it is unknown precisely how many non-State owned buildings are affected by Sec. 1008, it is stipulated that the cost incurred by all such building owners to comply with Sec. 1008 will exceed \$10,769,724.

If called upon to testify, officials of the State of North Carolina, Division of Engineering, would testify, under oath, that the cost to bring State owned buildings into compliance with Sec. 1008 would be approximately \$5 million.

4. In addition to incurring the above costs, building owners affected by Sec. 1008 may experience one or more of the following: Loss of rentable space, tenant inconvenience, rent abatement, and competitive disadvantage.

Plaintiff, an unincorporated association of building owners and managers, brought this action to have Sec. 1008 declared invalid and to enjoin its enforcement. In its complaint plaintiff alleged that the Council had exceeded its statutory authority when it adopted Sec. 1008 in that the General Assembly has not granted it any power to regulate the construction or design of existing buildings; that if such authority is found to have been granted, the General Assembly has failed to prescribe adequate standards for its exercise; that any authority which may be found to have been granted is limited by the provisions of G.S. 143-138(c) to permit adoption only of such regulations as bear a reasonable and substantial connection with public health, safety, or general welfare, which the regulations imposed by Sec. 1008 do not do; that the Council's authority is further limited by G.S. 143-138(c) to the adoption only of such regulations as conform to good engineering practice as evidenced generally by the requirements of certain national and regional building codes therein enumerated, and Sec. 1008 imposes requirements on existing buildings not imposed by any of the enumerated codes; and, final-

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ly, that adoption of Sec. 1008 contravenes the Federal and State Constitutions in that it deprives plaintiff and its members of their property without due process of law by arbitrarily and capriciously imposing retroactive regulations on existing buildings not reasonably necessary to the public health, safety or welfare, and denies plaintiff and its members the equal protection of the laws by classifying existing buildings for regulatory purposes in an arbitrary and unreasonable manner. Plaintiff further alleged it had exhausted all available administrative remedies.

Defendants, in addition to the State Building Code Council and its members, are the Commissioner of Insurance and the Deputy Commissioner in charge of the Division of Engineering of the North Carolina Department of Insurance, who by G.S. 143-139(b) are given general supervision of the administration and enforcement of the State Building Code. Defendants filed answer, admitting that plaintiff had exhausted all administrative remedies, but denying that the Council had exceeded its authority in adopting Sec. 1008.

The trial court, finding that in adopting Sec. 1008 the Council exceeded its statutory authority, granted plaintiff's motion for summary judgment and declared Sec. 1008 invalid, unenforceable, and in violation of the North Carolina Constitution. From this judgment, defendants appeal.

Berry, Bledsoe & Hogewood by H. A. Berry, Jr., Dean Gibson, and Jackie D. Drum for plaintiff appellee.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for defendant appellants.

PARKER, Judge.

The question presented is whether the Legislature has granted the North Carolina State Building Code Council power to amend the State Building Code so as to impose new and more stringent requirements mandating that changes be made in existing buildings which, prior to such amendment, conformed to all requirements of the Code and which are neither undergoing alteration nor change in use. The trial court held that it had not. We agree and affirm.

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The Council is an agency of the State created by the Legislature by Article 9 of G.S. Ch. 143. As a State agency created by the Legislature, it has only such powers as have been lawfully delegated to it by the Legislature. To ascertain what those powers are requires examination of both the language and the history of the pertinent statutes.

The first legislative Act of statewide application regulating the design and construction of buildings was Ch. 506 of the Public Laws of 1905. That Act, which applied only to incorporated cities and towns of over one thousand inhabitants, provided for the establishment of fire limits within such cities and towns and directed that within the fire limits so established no wooden or frame building should thereafter be erected. The Act then provided detailed specifications governing such matters as the design, materials, and construction of foundations, walls, roofs, fireplaces, chimneys, and flues. Sec. 26 of the Act provided that "before a building is begun," the owner should apply for a building permit, which permit should be in writing and should contain a provision that "the building shall be constructed according to the requirements of the building law." Other sections, *e.g.* Sections 8, 14, and 17, made express reference to buildings "hereafter erected." Sec. 9 of the Act provided that "all regulations contained in this law shall apply also where walls or buildings are raised, altered or repaired." Sec. 15 applied to buildings which "shall appear to the inspector to be especially dangerous in case of fire by reason of bad condition of walls, overloaded floors, defective construction, decay or other causes." A reading of the entire 1905 Act makes it clear that the Legislature intended its regulations governing design and construction to apply only to buildings to be erected, altered, or repaired after its effective date, with special provision being made in Sec. 15 for buildings which might become "especially dangerous in case of fire by reason of bad condition of walls, overloaded floors, defective construction, decay or other causes." Nothing evidences a legislative intent that the construction regulations imposed by the Act should apply to any existing building which was not being altered or repaired and which was not "especially dangerous."

Certain of the detailed regulations of the 1905 Act were amended by Ch. 192 of the Public Laws of 1915. Sec. 4 of the 1915 Act rewrote the above quoted portion of Sec. 9 of the 1905 Act to

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read as follows: "All rules, regulations and requirements contained in the building law, or set out in this sub-chapter in regard to the erection of buildings, or any part thereof, shall apply also where any building or walls, or any part thereof, is proposed to be raised, altered, repaired or added to, in order that the objects of the law may be accomplished and deficiencies and menaces to the safety of the city or town may not be made or perpetuated." Thus, the 1915 amendment carried forward the basic distinction which the 1905 Act had recognized between buildings erected before and after passage of the law by making the construction regulations applicable to existing buildings only "where any building or walls, or any part thereof, is proposed to be raised, altered, repaired or added to."

The construction regulation provisions of the 1905 Act, as amended in 1915, were codified in Art. 11 of Ch. 56 of the Consolidated Statutes, appearing therein as Sections 2748 through 2776. These statutes remained the only general laws of statewide application regulating building design and construction practices until enactment of Ch. 392 of the 1933 Session Laws. This Act for the first time created an official State Building Code Council. This Council was composed of five members who were appointed by the Governor. Sec. 6 of the Act provided in part:

It shall be the duty of the Council not only to make recommendations to the Insurance Commissioner relative to the proper construction of the pertinent provisions of the Building Code but it shall also recommend that he shall allow materials and methods of construction other than those required by the Building Code to be used, when in its opinion such other material and methods of construction are as good as those required by the Code, and for this purpose the requirements of the Building Code as to such matters shall be considered simply as a standard to which construction shall conform.

Interpreting the powers granted to it by the 1933 Act somewhat broadly, the Building Code Council adopted a State Building Code, which, after being submitted to and approved by the Insurance Commissioner, was promulgated in 1936 as the State Building Code. Section 1.11 of this code, entitled "Purpose," was as follows:

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Section 1.11. *Purpose.* The purpose of the code is to provide certain minimum standards, provisions and requirements for safe and stable design, methods of construction and uses of materials in buildings and/or structures hereafter erected, constructed, enlarged, altered, repaired, moved, converted to other uses or demolished and to regulate the equipment, maintenance, use and occupancy of all buildings and/or structures.

Section 1.2, entitled "Scope," provided in Subsec. 1.21 that the code "shall apply to all new buildings, structures and additions thereto" except for dwellings, apartment buildings for not more than two families, buildings used for agricultural purposes, and temporary buildings. Section 1.22 provided that the code "shall apply to all alterations which affect the structural strength, fire hazards, exits, lighting or sanitary conditions of any building." Section 1.23 provided that the code "shall apply to all buildings which are to be devoted to a new use for which the requirements of this code are in any way more stringent than the requirements covering the previous use of the building." Thus, the "Purpose" and "Scope" provisions of the 1936 Code made it clear that the Code applied to new buildings and to alterations or changes in use of existing buildings and that it did not apply to existing buildings which were neither being altered nor changed in use.

In 1941 the Legislature, by Ch. 280 of the Public Laws of 1941, "ratified and adopted" the 1936 Code which had been promulgated by the Building Code Council. By the same 1941 Act the Legislature empowered the Council to adopt additional regulations provided it "shall not establish any standard or adopt or promulgate any rule, regulation, classification, limitation or restriction more rigid, exacting or stringent in its requirements" than was promulgated by the Council in its 1936 Code. The inclusion of this limitation in the 1941 Act evidenced a clear legislative intent to prohibit the Council from intruding into areas which the Legislature had not yet decided should be regulated. One area which it is clear the Legislature had not yet authorized the Council to regulate was that of existing buildings which were neither being altered or changed in use.

The present statutory provisions from which the present Building Code Council derives its existence and powers are con-

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tained in Article 9 of G.S. Ch. 143. The basic portions of this Article were enacted by Ch. 1138 of the 1957 Session Laws. G.S. 143-138(a) expressly empowers the Council "to prepare and adopt, in accordance with the provisions of this Article, a North Carolina State Building Code." G.S. 143-138(c) specifies standards to be followed by the Council in adopting and amending the Code by requiring that the provisions of the Code "shall conform to good engineering practice, as evidenced generally by" certain specifically referred to and generally recognized national codes. This replaced the provision of the 1941 Act that the Council could adopt no requirement more stringent than contained in the 1936 Code. The Legislature carefully defined the scope and applicability of the Code which it authorized the Council to adopt in G.S. 143-138(b) as follows:

(b) Contents of the Code.—The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; regulations governing construction and precautions to be taken during construction; regulations as to permissible materials, loads, and stresses; regulations of chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; regulations governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules and regulations pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

The Code may contain provisions regulating every type of building or structure, wherever it might be situated in the State.

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Basically, the question presented when undertaking to ascertain the meaning of the above quoted portions of G.S. 143-138(b) is to determine whether the Legislature, when it empowered the Council to adopt a State Building Code, intended to authorize the Council to adopt a code regulating *construction* or a code regulating *structures*, that is to say, a code governing *building* or a code governing *buildings*.

When the first sentence G.S. 143-138(b) is analyzed grammatically, it will be seen that the subject and verb, "The North Carolina State Building Code . . . may include," are followed by a long series of objects which carefully list the *kinds* of regulations the Code may contain. The concluding item in this list, "such other reasonable rules and regulations," is followed by the gerundive phrase, beginning with the word "pertaining," which defines the authorized scope of *applicability* of the code's regulations, the scope of the *subject matter* of which has been defined by the long series of objects immediately preceding. The gerundive phrase makes clear that the code's regulations must pertain to "the *construction* of buildings and structures and the *installation* of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large." (Emphasis added.) It seems clear that the initial portion of this phrase containing the words, "the construction of buildings and structures," refers to new construction; the remainder of the phrase is at best ambiguous in this regard.

Appellants contend that the second sentence of G.S. 143-138(b) serves to make clear that the Legislature intended to grant the Council power to adopt building code provisions regulating every existing building, whether or not such existing building was being altered or changed in use. We do not agree. Had the Legislature intended that the Code might regulate *every* building in the State, including every existing building which was neither being altered or changed in use, it could easily have said so. Instead, it inserted the words "type of" between the word "every" and the word "building," by so doing emphasizing that the Code might regulate every building, whatever its *type*, e.g. commercial, industrial, residential, etc. This interpretation of the sentence is reinforced by the proviso which immediately follows which makes the Code inapplicable to certain farm buildings.

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Any uncertainty as to legislative intent which might result from such ambiguity as exists in the language of G.S. 143-138(b) is to a considerable extent dispelled when the enforcement provisions of Article 9 of G.S. Ch. 143 are examined. G.S. 143-138(h) contains the following sentence which was added by Sec. 6 of Ch. 1229 of the 1969 Session Laws:

In case any building or structure is erected, constructed or reconstructed, or its purpose altered, so that it becomes in violation of the North Carolina State Building Code, either the local enforcement officer of the State Commissioner of Insurance or other State official with responsibility under G.S. 143-139 may, in addition to other remedies, institute any appropriate action or proceedings (i) to prevent such unlawful erection, construction or reconstruction, or alteration of purpose, (ii) to restrain, correct, or abate such violation, or (iii) to prevent the occupancy or use of said building, structure, or land until such violation is corrected.

This sentence evidences a Legislative understanding that the Building Code which it had authorized the Council to adopt should regulate only new construction or buildings being reconstructed or altered in purpose.

Appellants point out that on two occasions, once by Ch. 280 of the 1941 Public Laws and again in Ch. 1138 of the 1957 Session Laws, the Legislature expressly ratified and adopted building codes theretofore promulgated by the Building Code Council which contained provisions regulating passively existing buildings. From this they argue that the Legislature by implication recognized the power of the Council to adopt such provisions. We do not agree. Many of the provisions relating to passively existing buildings contained in the 1936 Code which the Legislature ratified and adopted in the 1941 Act were simply carrying forward building regulations which the Legislature had itself enacted as early as 1905. That the Legislature "ratified" the Council's action recognizing that the Legislature's own statutory regulations continued in effect hardly furnishes a basis for implying that the Legislature thereby acknowledged the power of the Council to enact such regulations on its own. Moreover, the ratification and adoption by the Legislature of regulations previously promulgated by an administrative agency does not

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necessarily carry with it the implication that the Legislature thereby recognized that the agency had previously been granted the power to adopt such regulations. Indeed, quite the reverse implication may be logically drawn, else why was it necessary for the Legislature to ratify what the agency had done?

Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E. 2d 231 (1975), cited by appellants, does not support their contention that the Building Code Council was empowered to regulate all existing buildings. In *Greene* the Court did find a legislative intent to create a complete and integrated regulatory scheme requiring installation of sprinkler systems in certain buildings and that this scheme involved the Building Code Council, but the Court pointed out that "the intent to vest controlling regulatory authority in the Building Code Council appears within the provisions of G.S. 69-29 in that the Legislature provided that the installations of the sprinkler systems required by statute must ultimately be of such design, condition, and scope 'as may be approved by the North Carolina Building Code Council.'" 287 N.C. at 75, 213 S.E. 2d at 237. Thus, the role of the Building Council was to establish standards for the sprinkler systems, the installation of which had been mandated by the Legislature itself by specific statutory enactment. The "complete and integrated regulatory scheme" of which the opinion in *Greene* spoke was not established by a single statute but by "statutes." By G.S. 69-29 the Legislature required automatic sprinkler systems to be provided in certain types of buildings; only the design, construction and scope of such systems were made subject to the approval of the Council. The very care with which individual sections of G.S. Ch. 69 spell out fire protection requirements for certain existing buildings demonstrates that the Legislature intended to retain for itself the authority to mandate the equipment of existing buildings with fire protection devices. The authority which it granted the Building Code Council to establish technical standards for such devices was a much more limited one, calling for technical determinations in the field of the Council's expertise rather than in the field of broad legislative policy. It can hardly be supposed that the Legislature intended to delegate to the Council in G.S. Ch. 143 decisions which it had made itself in G.S. Ch. 69.

The problem presented by this case, as with every case involving interpretation of a statute, ultimately centers on ascer-

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taining the true intent of the Legislature. *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). This intent is to be found in the wording of the statute itself, viewed against the background of its history and with due regard given for the reason for its enactment and its relationship and interplay with other statutes. So examining G.S. 143-138(b), we find in it no clearly expressed grant of power from the Legislature to the Building Code Council to amend the State Building Code so as to impose new and more stringent requirements upon existing buildings which, prior to such amendment, fully complied with the Code and which are neither being altered or changed in use. Further, we find nothing in the wording of the statute evidencing a legislative intent that the grant of such a drastic power should be implied. The history of the statute and its interplay with other statutes strongly negative such an implication.

We find, therefore, that no express or necessarily implied power has been granted by our Legislature to the Building Code Council to amend the State Building Code in the manner which the Council attempted to do when it adopted Section 1008 of the Code. Accordingly, the judgment appealed from is

Affirmed.

Judges CLARK and ERWIN concur.

HIGH ROCK LAKE ASSOCIATION INC. AND MARY DAVIS v. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, JOHN W. THOMAS, JR., P. GREER JOHNSON, EDWIN C. BAKER, OWEN R. BRAUGHLER, PAUL DICKSON, ERSKIN L. HARKEY, JR., ROBERT W. HESTER, JAMES E. HARRINGTON, JR., LOUIS J. MARCHETTI, JEROME E. SHIFFERT, W. E. STRAFFORD, D. J. WALKER, JR., AND JAMES C. WALLACE

No. 7810SC179

(Filed 20 February 1979)

1. Waters and Watercourses § 3; Administrative Law § 4— fact finding hearing—no order entered—no judicial review

The use of evidence from a fact finding informal hearing to determine whether to initiate a proceeding to declare the Yadkin River Basin a capacity

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use area and to subject its water users to a permit-letting system was purely within the defendant's discretion, and plaintiff riparian landowners were not entitled to judicial review of such hearing; moreover, even if such hearing did fall under G.S. 143-215.13(d), plaintiffs were not entitled to judicial review, since no order was issued by defendant which in turn could have adversely affected plaintiffs.

2. Administrative Law § 5— fact finding hearing—no contested case—no judicial review

A fact finding hearing conducted by defendant to consider whether to initiate proceedings to declare the Yadkin River Basin a capacity use area was no more than the G.S. 143-215.13(c) rule making type procedure and was not a contested case, and plaintiffs were thus not entitled to judicial review under the Administrative Procedure Act, G.S. 150A-43 *et seq.* Moreover, plaintiffs failed to exhaust their administrative remedies, since they could have sought a declaratory ruling pursuant to G.S. 150A-17 which would have been subject to judicial review under G.S. 150A-43, but they failed to do so.

3. Administrative Law § 2; Declaratory Judgment Act § 3— no right to adjudicatory hearing—failure to exhaust administrative remedies—no declaratory judgment

The trial court did not err in dismissing plaintiffs' complaint for declaratory judgment which prayed the court to declare the Yadkin River Basin a capacity use area, or in the alternative, to remand the case for further proceedings consistent with their alleged procedural right to an adjudicatory hearing, since there was no right to an adjudicatory hearing in this matter, and since plaintiffs failed to exhaust administrative remedies before seeking to have the Yadkin River Basin declared a capacity use area.

APPEAL by plaintiffs from *Godwin, Judge*. Order entered 30 November 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 8 January 1979.

Plaintiffs are an association of riparian property owners on High Rock Lake and an individual riparian landowner on the Yadkin River in Davie County. The defendant is the Environmental Management Commission of the Department of Natural and Economic Resources and is empowered with applying the Water Use Act of 1967, G.S. 143-215.11 *et seq.* Duke Power Company, which is not a party to this action, is proposing to construct a nuclear power plant to be located on the Yadkin River upstream from High Rock Lake near the confluence of Dutchman's Creek. Duke proposes to withdraw up to 72,000,000 gallons per day of water from the river to be used in the operation of a closed cycle cooling system utilizing nine mechanical draft wet cooling towers. Duke and the Commission initiated an investigation into

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the environmental effects of the proposed water use. The plaintiffs became involved in the matter because of their concern that the water withdrawal would have an adverse effect on the river basin by contributing to further what they perceive as an already high degree of eutrophication.

The Environmental Management Commission of the Department of Natural and Economic Resources, due to public concern over the effect of the proposed water use on downstream water quality and quantity, directed that an investigation of the proposed water use be undertaken by the Department of Natural and Economic Resources and that a recommendation be prepared on whether the Yadkin River Basin should be declared a "capacity use area".¹ The Department recommendation was against such a declaration. The Commission, nevertheless, held a public meeting 6 September 1976, to consider the question of declaring a "capacity use area". As a result of the public meeting, "the Commission decided to hold two public hearings to consider whether a capacity use [area] should be declared and/or an order issued to Duke pursuant to N.C.G.S. 143-215.13(d)."²

On 27 October 1976, the Environmental Management Commission conducted a hearing, after notice, which permitted written and oral testimony and questions to the chairman. The hearing record was held open for 30 days for further written testimony. The testimony taken at the hearings was unsworn, no cross-examination was allowed, and no hearing officer was appointed.

The plaintiffs in this action filed a petition for review and a complaint for declaratory judgment on both procedural and

1. "A 'capacity use area' is one where the Environmental Management Commission finds that the aggregate uses of ground water or surface water, or both, in or affecting said area (i) have developed or threatened to develop to a degree which requires coordination and regulation, or (ii) exceed or threaten to exceed, or otherwise threaten or impair, the renewal or replenishment of such waters or any part of them." G.S. 143-215.13(b).

2. "The Environmental Management Commission may conduct a public hearing pursuant to the provisions of G.S. 143-215.4 in any area of the State, whether or not a capacity use area has been declared, when it has reason to believe that the withdrawal of water from or the discharge of water pollutants to the waters in such area is having an unreasonably adverse effect upon such waters. If the Environmental Management Commission determines, pursuant to hearing, that withdrawals of water from or discharge of water pollutants to the waters within such area has resulted or probably will result in a generalized condition of water depletion or water pollution within the area to the extent that the availability or fitness for use of such water has been impaired for existing or proposed uses and that injury to the public health, safety or welfare will result if increased or additional withdrawals or discharges occur, the Environmental Management Commission may issue an order: . . .

(2) Prohibiting any person from constructing, installing or operating any new well or withdrawal facilities having a capacity in excess of a rate established in the order; but such prohibition shall not extend to any new well or facility having a capacity of less than 10,000 gallons per day." G.S. 143-215.13(d).

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substantive grounds. Plaintiffs allege that not only were they denied statutory and constitutional procedural rights, but that the Commission's Resolution No. 76-41, refusing to declare a capacity use area or to issue an order pursuant to G.S. 143-215.13(d), was contrary to competent, material, and substantial evidence. The petition and complaint were dismissed by the Superior Court upon defendant's motion. From entry of the order dismissing the petition, plaintiffs appeal.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Pfefferkorn and Cooley, by William G. Pfefferkorn and David A. Wallace, for plaintiff appellants.

MORRIS, Chief Judge.

The petition for judicial review and the complaint for declaratory relief were dismissed by the Superior Court on the ground that the court had no jurisdiction to review the matter. The narrow question before this Court is whether the petition sufficiently alleges grounds for judicial review of the Commission's action.

Judicial Review

[1] The plaintiffs assert two grounds for judicial review. First, plaintiffs argue that the hearing by the Commission on 27 October 1976 constituted a formal proceeding to determine whether the Commission should, without declaring the Yadkin River Basin a "capacity use area", issue an order restricting the withdrawal of water. A hearing before issuing such an order is required by G.S. 143-215.13(d) and is subject to specific adjudicatory-like procedures as set forth in G.S. 143-215.4. Judicial review of the order entered in such a proceeding is available, pursuant to the provisions of G.S. 143-215.5, to "[a]ny person who is adversely affected by an order of the Environmental Management Commission issued pursuant to [G.S. 143-215.13(d)]".

On the other hand, the Commission asserts that the proceeding served two functions. It served as a procedure pursuant to G.S. 143-215.13(c) to determine whether the Yadkin River Basin should be designated a capacity use area and its water users sub-

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jected to a permit-letting system. Plaintiffs do not contest this proposition. Second, and the major point of dispute, the Commission asserts that the hearing also served the function of a general information gathering tool to have injected public participation at a state of decision-making generally reserved to staff participation. This participation was, the Commission asserts, to aid it in determining whether to initiate proceedings which would ultimately involve proposing the issuance of a permit under G.S. 143-215.13(d) and a hearing of an adjudicatory nature. The Commission contends that they had not yet reached the stage in the decision-making process that necessitated formal hearing required by "13(d)".

The Commission's characterization of the proceeding as an informal stage of the decision-making process with respect to the "13(d)" considerations appears accurate. We perceive no evil in allowing the Commission to utilize the evidence presented at that hearing in determining whether it should initiate proceedings pursuant to G.S. 143-215.13(d). The Commission's use of that public participation can be likened to the district attorney's evaluation of all facts available to him in determining whether criminal prosecution should be pursued. Our courts must refrain from the impulse to subject essentially discretionary matters to the rigors of administrative procedural requirements whether under an organic act or the Administrative Procedure Act, G.S. Chapter 150A. As noted by Professor Daye in his article "North Carolina's New Administrative Procedure Act: An Interpretive Analysis", 53 N.C.L. Rev. 833 (1975), "A degree of informality may be essential if agencies are to accomplish the missions assigned to them with flexibility and expedition." *Id.* at 847. Furthermore, assuming *arguendo* that the hearing should have fallen under G.S. 143-215.13(d), the statute limits those who may appeal from the agency action:

"§ 143-215.13. . . .

(d) . . .

Any person who is adversely affected by an order of the Environmental Management Commission issued pursuant to this subsection may seek judicial review of the order pursuant to the provisions of G.S. 143-215.5; and the order shall not be stayed by the appeal."

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The foregoing provision operates as a statutory limitation on the standing of parties interested in or affected by the action to seek judicial review. Therefore, based on a plain reading of the statute, since no order was issued by the Commission which in turn could have adversely affected the plaintiffs, plaintiffs are not entitled to judicial review under the foregoing statutory provision.

[2] Plaintiffs' alternative ground for seeking judicial review is based upon the judicial review provisions of the North Carolina Administrative Procedure Act, G.S. Chapter 150A, Art. 4. The right of judicial review under that article is determined by the following language:

"§ 150A-43. *Right to judicial review.*— Any person who is aggrieved by a final agency decision in a *contested case*, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article." (Emphasis supplied.)

Plaintiffs contend that "the matters heard on October 27, 1976 constitute a 'contested case'" entitling plaintiffs to judicial review under Chapter 150A, Art. 4.

The term "contested case" is defined in the statute as follows:

"§ 150A-2. Definitions.— . . .

(2) 'Contested case' means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant."

It is apparent from the statute, therefore, that the determinative question is whether plaintiffs are entitled "by law" to an ad-

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judicatory hearing. We note initially that by organic statute, to the extent they seek review of the capacity use area proceeding, the plaintiffs are entitled only to a hearing under G.S. 143-215.13(c) in the nature of a rule making hearing such as under Article 2 of the Administrative Procedure Act, G.S. 150A-9 *et seq.* Nevertheless, our inquiry goes beyond statutory law. If the fundamental concepts of due process entitle plaintiffs to an adjudicatory hearing, then the matters considered at the hearing are required "by law" to be determined by an adjudicatory hearing and thus are entitled to judicial review under G.S. 150A-43.

In order to determine whether due process entitles the plaintiffs to an adjudicatory hearing, it is helpful first to consider what legal rights, duties, or privileges of the plaintiffs are affected. As noted above, the plaintiffs are riparian landowners concerned with the quality of water in the Yadkin River Basin. The declaration of the Yadkin River Basin as a capacity use area would entitle the Commission to issue regulations to be applied to the area concerning the use of water, G.S. 143-215.14, and would require certain water users to apply for permits before utilizing the waters. G.S. 143-215.15 and G.S. 143-215.16. The benefit to plaintiffs and other persons utilizing the resources of the Yadkin River Basin is a general one. They receive the indirect benefit (or perhaps direct burden) of regulation intended to conserve the water resources and to maintain conditions which are conducive to the development and use of the resources. *See* G.S. 143-215.12. The impact of the decision whether to declare an area as a "capacity use area" has a general effect on the entire class of persons who utilize the resource.

A determination of whether an adjudication is required by due process requires an evaluation of the nature of the Commission's decision. Where the decision rests on findings of a general nature and not upon "individual grounds", the determination need not be adjudicative. *See Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915). Our decision involves an application of the historic legal distinction between rule making and adjudication, *i.e.* legislative and adjudicative determinations. Professor Daye, in his article on the North Carolina Administrative Procedure Act, offers this guide for distinguishing rule making from adjudication:

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"The touchstone for distinguishing adjudication from rulemaking is that adjudication involves a specifically named party and a determination of particularized legal issues and facts with respect to that party. Rulemaking, by contrast, involves general categories or classes of parties and facts and policies of general applicability." Daye, *supra*, 53 N.C.L. Rev. at 868.

The leading treatise on administrative law offers this distinction:

"Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." 1 K. Davis, *Administrative Law Treatise* § 7.02 at p. 413 (1958).

Both the Commission and plaintiffs quote the following distinction made by Justice Holmes between the judicial-adjudicatory inquiry and the legislative inquiry:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150, 158 (1908).

Further elaboration of the due process concepts involved in determining the necessity of an adjudicative hearing is unnecessary. We find it abundantly clear from the foregoing authorities that the procedure employed by the Commission was no more than the G.S. 143-215.13(c) rule making type procedure and thus plaintiffs are not entitled to judicial review under G.S. 150A-43 *et seq.*

Insofar as plaintiffs assert that their interest in an order pursuant to G.S. 143-215.13(d) entitles them to judicial review under the Administrative Procedure Act, we reiterate our previously

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expressed view that the use of evidence from the hearing to consider whether to initiate a .13(d) proceeding was purely within the discretion of the Commission. There were no legal rights, duties, or privileges determined by using that information. The information was part of a preliminary inquiry, prerequisite to a decision to initiate a formal “.13(d)” hearing. See *Miller v. Alcoholic Beverages Control Commission*, 340 Mass. 33, 162 N.E. 2d 656 (1959); see generally *Daye, supra*, 53 N.C.L. Rev. at 871.

We find it appropriate to note that plaintiffs apparently were not without other available avenues to seek review of the proceeding to determine whether a capacity use area should be declared in the Yadkin River Basin. Plaintiffs were entitled to seek a declaratory ruling pursuant to G.S. 150A-17. Such a ruling would then be subject to judicial review under G.S. 150A-43. Therefore, not only have plaintiffs not presented a “contested case”, it appears they have failed to satisfy a preliminary condition to judicial review—the exhausting of available administrative remedies. See G.S. 150A-43.

Declaratory Judgment

[3] Plaintiffs contend that the trial court erred in dismissing their complaint for declaratory judgment which prayed the court to declare the Yadkin River Basin a capacity use area, or in the alternative, to remand the case for further proceedings consistent with their alleged procedural right to an adjudicatory hearing. Therefore, the question which the plaintiffs present to this Court is whether they are entitled to judicial review of an administrative decision outside the procedures specifically provided in the Water Use Act of 1967 or the Administrative Procedure Act.

The Administrative Procedure Act apparently does not preclude entirely the possibility of judicial review by use of the declaratory judgment act or other procedures outside the Act. “Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.” G.S. 150A-43. Furthermore, in applying comparable declaratory action and administrative procedure statutes, the declaratory judgment has been recognized as an effective tool for

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judicial review of administrative decisions under appropriate circumstances in the federal courts. *See generally* 3K. Davis, Administrative Law § 23.04; 5 Megines, Stein, Gruff, Administrative Law § 46.03; *see e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967). Similarly, in a very recent decision, our Supreme Court has recognized, implicitly at least, that the declaratory judgment remedy might be available under appropriate circumstances to review an administrative decision where the parties present an actual or real existing controversy. *See Adams v. Dept. of N.E.R.* and *Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978). The Court in that case determined that plaintiffs' contention that the designation of their land as an "interim" area of environmental concern by the Coastal Resources Commission amounted to an unconstitutional taking of their land was premature and thus not justiciable. *Id.*

We find in the case at bar that plaintiffs have failed to present an appropriate case for declaratory judgment. Insofar as the plaintiffs seek a declaration of their asserted right to an adjudicatory hearing, we need not determine whether the trial court erred in dismissing the action for lack of jurisdiction. It has already been determined above in our consideration of the plaintiffs' right to judicial review that there is no right to an adjudicatory hearing in this matter. Assuming *arguendo* that the trial court erred in dismissing the action, it would be fruitless to reverse and remand the matter for determination of these same procedural rights. The law is not so impractical.

[2] Furthermore, plaintiffs' prayer for a declaration of the Yadkin River Basin as a capacity use area does not arise in a posture ripe for judicial determination. The Commission's action is properly reviewable, as we noted above, by first seeking a declaratory ruling (G.S. 150A-17) and then presenting the matter for review pursuant to G.S. 150A-43. Such procedures must be followed to protect the agencies from judicial interference until a concrete decision has been reached. Once the agency has issued a declaratory ruling with respect to its action, the courts are better able to review the ruling according to established criteria which appropriately take into account agency expertise. *See* G.S. 150A-51 (scope of review).

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For the foregoing reasons, the decision of the trial court dismissing the action must be

Affirmed.

Judges MARTIN (Harry C.) and CARLTON concur.

RENT-A-CAR COMPANY, INC. v. MARK G. LYNCH, SECRETARY OF REVENUE OF
THE STATE OF NORTH CAROLINA

No. 7810SC257

(Filed 20 February 1979)

1. Taxation § 31.3— rental of vehicles—payment of sales tax on rentals—sale of vehicles to individuals—exemption from sales tax

A company engaged in the business of renting and leasing motor vehicles is entitled under G.S. 105-164.4(1) to an exemption from sales tax on the sale of its rental and lease vehicles to private individuals where it paid the sales tax on the rental and lease of the vehicles.

2. Taxation § 38.3— payment of assessment in installments—demand for refund after last installment

Where a taxpayer and the Department of Revenue agreed on an installment plan for the taxpayer's payment of a sales tax assessment, the taxpayer made a timely demand for a refund of the entire assessment, including each installment, where he made a written demand for refund within 30 days after payment of the last installment, it not being necessary to make a demand for a refund of each installment within 30 days after payment of the installment. G.S. 105-267.

APPEAL by plaintiff and defendant from *Brewer, Judge*. Judgment entered 8 February 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 10 January 1979.

Plaintiff, Rent-A-Car Company, Inc. ("Rent-A-Car") is engaged in the business of renting and leasing motor vehicles, with its principal office and place of business in Greensboro. Plaintiff paid the North Carolina retail sales tax imposed under Section 105-164.4 of the General Statutes of North Carolina on the rentals and leases of its cars. Between 1 August 1968 and 30 June 1971, plaintiff sold approximately 240 cars that had been in the inventory of cars used for renting and leasing. Fifty-three percent of

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these sales were to private individuals and remainder to wholesale retailers. Plaintiff did not collect or pay North Carolina sales tax upon any sales of the motor vehicles.

After examining plaintiff's business records in August 1971, the North Carolina Department of Revenue proposed an assessment of an additional sales tax, penalty and interest relative to plaintiff's sales of motor vehicles to private individuals. There were no assessments for sales tax on motor vehicles sold to wholesale retailers because those sales were for the purpose of resale.

Department of Revenue and plaintiff entered into an agreement in November 1971 that the balance due on the total assessed tax was \$26,826.67, plus \$626.61 in accrued interest. No penalty was assessed. Plaintiff and Department of Revenue agreed on a five month installment plan beginning 1 December 1971, with \$3,000 payment each month and a final payment of \$12,453.28.

Plaintiff remitted payments of \$3,000 each in December 1971, January 1972, and February 1972 without demand for refund within 30 days after payment. Subsequently plaintiff remitted two payments of \$3,000 each in March 1972 and the final payment of \$12,453.28 in August 1972. By a letter of 28 March 1972, plaintiff notified Department of Revenue that payments were made under protest and demanded refund of all payments. Demand for refund of the entire tax was again made 10 August 1972, within 30 days of the final installment. Payments were not refunded, and on 12 January 1973, plaintiff brought this action.

Trial court granted plaintiff's claim for refund except for the payments of \$3,000 each made in December 1971, January 1972 and February 1972. Trial court found plaintiff did not enter a timely demand (within 30 days of payment) for refund of those payments. From this judgment, plaintiff and defendant appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for Secretary of Revenue of North Carolina, defendant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Howard L. Williams, for plaintiff.

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MARTIN (Harry C.), Judge.

Upon the appeal of both parties, two questions are presented. First, Mark G. Lynch, Secretary of Revenue of the State of North Carolina, appeals the trial court's ruling that Rent-A-Car is entitled to the exemption from sales tax on the sale of its rental and lease motor vehicles because a tax had been paid pursuant to N.C. G.S. 105-164.4(1). Second, Rent-A-Car appeals the trial court's ruling denying refund of the payments made in December 1971, January 1972, and February 1972 for the reason Rent-A-Car did not make demand for refund within 30 days of the payments, pursuant to N.C.G.S. 105-267.

[1] As to the first question, defendant contends the trial court erred in ruling the sales taxes paid on the rental and lease transactions satisfied the tax requirements of N.C.G.S. 105-164.4(1). It is defendant's contention plaintiff must pay a retail sales tax on motor vehicles used in the rental and leasing business that are sold to private individuals. Plaintiff maintains it is exempt from the sales tax on the sale of the cars because it paid the sales tax on the rental and lease of the cars.

A review of the tax imposed by N.C.G.S. 105-164.4(1) is essential to an understanding of the exemption. The retail sales tax is imposed upon persons engaged in the business of "selling tangible personal property at retail, renting or furnishing tangible personal property." N.C. Gen. Stat. 105-164.4(1). The statute imposes a tax rate of 3% on personal property, except that on motor vehicles the rate is 2% with a maximum of \$120 per vehicle. N.C. Gen. Stat. 105-164.4(1). A use tax is imposed on motor vehicles with an exemption from the use tax if the sales tax is paid with respect to a motor vehicle. Under certain circumstances, the following exemption applies:

The tax levied under this subdivision shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this Article has been paid with respect to said motor vehicle.

N.C. Gen. Stat. 105-164.4(1). Interpretation of this exemption is the subject of this appeal.

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The language in the above exemption, "[t]he tax levied under this subdivision," refers to the sales or use tax imposed under N.C.G.S. 105-164.4. The exemption is granted to the "owner" of a motor vehicle. The defendant contends this exemption does not apply to a retailer such as plaintiff *and* to an owner. The defendant further contends the exemption is granted for the use tax which is a tax on the owner and not the sales tax which is a tax upon the retailer. We disagree with the defendant's contention in part.

The sales tax has been held to be primarily a privilege or license tax on retailers, *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 123 S.E. 2d 582, 91 A.L.R. 2d 1127 (1962); *In re Oil Company*, 273 N.C. 383, 160 S.E. 2d 98 (1968), and not a tax on consumers, *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E. 2d 663 (1972). The purpose of the use tax as indicated by the legislative histories of use and sales taxes is to "impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the state." *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 166 S.E. 2d 671 (1969).

Even though the sales tax is primarily a license or privilege tax on retailers, *Canteen, supra*, the intent of the law is that the sales tax be passed on to the consumer. N.C. Gen. Stat. 105-164.7; *Manufacturing Co. v. Johnson, Comr. of Revenue*, 264 N.C. 12, 140 S.E. 2d 744 (1965). The law requires retailers to add the sales tax to the price of the article or items purchased. *Id.* Further, it is a misdemeanor for a retailer to offer to absorb the sales tax for the customer. N.C. Gen. Stat. 105-164.9. However, the retailer's failure to collect the sales tax does not excuse the retailer's liability for the tax. N.C. Gen. Stat. 105-164.7.

In some instances, the law does not allow the retailer to collect a sales tax. One of those instances is when the total amount of a sale is less than ten cents. N.C. Gen. Stat. 105-164.10. Even though the retailer is not allowed to collect the tax from customers on sales of less than ten cents, the retailer is still liable for the retail sales tax on the gross receipts derived. N.C. Gen. Stat. 105-164.10; *Canteen, supra*. This was specifically the incident that occurred in *Canteen*, where the taxpayer operated vending machines which sold items for a price of less than ten cents. The Commissioner contended taxpayer was liable for a sales tax on

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these sales. The taxpayer/retailer contended he should not have to pay the tax because the sales tax was a consumer's tax and the taxpayer/retailer was prohibited from charging the customers. The Court ruled for the Commissioner on the ground that a sales tax is a tax on the retailer, for which the retailer is liable even if the tax cannot be collected from the customer.

The case *sub judice* is distinguishable from *Canteen*. Under this exemption, the owner/purchaser is exempt from payment of a sales or use tax under the Article for the reason that a tax imposed by the Article has been paid. Plaintiff paid a sales tax on the rental transactions, which was a tax levied under this Article. Further, plaintiff is "not a dealer in new and/or used motor vehicles," a fact not contested by the defendant. N.C. Gen. Stat. 105-164.4(1). Where an owner is exempt from payment of sales tax because his retailer has already paid a tax imposed by the Article, the retailer should also be exempt from such sales tax. We hold this exemption prevents a sales tax from being levied against Rent-A-Car on motor vehicles sold by it to private individuals after it has paid sales tax on the rental and leasing of such vehicles.

[2] The second question, raised on appeal by Rent-A-Car, is the trial court's denial of refund for payments made in December 1971, January 1972, and February 1972 for the reason that plaintiff's demand for refund was not timely. The pertinent provisions of the statute are:

Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. *At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue* and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded.

N.C. Gen. Stat. 105-267 (emphasis added). It is well established in the law that a taxpayer may not challenge the levying of a tax by withholding payment until the matter is settled. *Enterprises, Inc. v. Dept. of Motor Vehicles*, 290 N.C. 450, 226 S.E. 2d 336 (1976).

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The taxpayer's remedy against the collection of a tax is to remit payment and then demand refund. *Id.* The defendant contends plaintiff was required to enter a demand for refund within 30 days after payment of each installment. Defendant relies solely upon the decision in *Power Co. v. Clay County*, 213 N.C. 698, 197 S.E. 603 (1938), where plaintiff failed to enter a protest at the time of payments as the statute then required. The statute at that time required payment of the tax and notification in writing that payment was under protest. The Court concluded protest was to be filed at the time of the payment. In 1957, the General Assembly deleted the protest requirement and replaced it with the demand provision substantially as it reads today. The application of this statute to installment payments of the tax liability was not considered in *Power Co.*, *supra*.

The statute requires a demand for refund in writing within 30 days after payment of the tax. We must determine when payment occurred. Plaintiff made payments under an installment agreement. We are concerned here with whether "payment" for the purposes of this statute occurred after the payment of each installment or after payment of the final installment. Federal cases have dealt with this problem in a federal statute for refunding of taxes, requiring claims for refund to be presented "within three years next after the payment of such tax." Revenue Act of 1926, G.S. ch. 27, § 319(b), 44 Stat. 81 (current version at I.R.C. § 6511 (1978)). See 94 A.L.R. 978 (1935). The payment of the tax was held to have occurred upon the payment of the last installment. *Tait v. Safe Deposit & Trust Co. of Baltimore*, 78 F. 2d 534 (4th Cir. 1935), *aff'g*, 8 F. Supp. 634 (D. Md. 1934); *United States v. Magoon*, 77 F. 2d 804 (9th Cir. 1935); *Union Trust Co. v. United States*, 70 F. 2d 629 (2nd Cir. 1934), *cert. denied*, 293 U.S. 564, 79 L.Ed. 664 (1934); *United States v. Clarke*, 69 F. 2d 748 (3rd Cir. 1934), *cert. denied*, 293 U.S. 564, 79 L.Ed. 664, 94 A.L.R. 975 (1934); *Hills v. United States*, 55 F. 2d 1001 (Ct. Cl. 1932); *Braun v. United States*, 46 F. Supp. 993 (Ct. Cl. 1934), *cert. denied*, 295 U.S. 760, 79 L.Ed. 1702 (1935). In this case, plaintiff was charged with a total tax assessment of \$26,826.67 plus interest accrued of \$626.61, totalling \$27,453.28. This amount was a single tax bill. The Department of Revenue merely granted the plaintiff a grace period for the payment of the tax by the installment agreement. The statute requires demand within 30 days after payment of the

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tax. We hold payment occurred upon payment of the final installment. Therefore plaintiff's demand for refund of the total tax assessment, including each installment, was timely entered. The trial court's denial of refund for the payments in December 1971, January 1972, and February 1972 is reversed. We hold plaintiff is entitled to refund of these payments plus interest.

The result is, plaintiff is entitled to refund of the entire tax and interest paid, \$27,453.28, together with applicable interest.

Affirmed in part and reversed in part.

Chief Judge MORRIS and Judge CARLTON concur.

JOE C. FOWLER, SR. AND MRS. BETTY H. FOWLER v. HENRY WILLIAMSON, INDIVIDUALLY AND AS PRINCIPAL OF HICKORY HIGH SCHOOL; CHARLES MASON, INDIVIDUALLY AND AS ASSISTANT PRINCIPAL OF HICKORY HIGH SCHOOL; DR. JOSEPH WISHON, INDIVIDUALLY AND AS SUPERINTENDENT OF HICKORY CITY SCHOOLS; BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT; HAROLD K. POOVEY, INDIVIDUALLY; SAM DULA, INDIVIDUALLY; GENE SMITH, INDIVIDUALLY; MRS. LOIS YOUNG, INDIVIDUALLY; MRS. MARTHA KARSLAKE, INDIVIDUALLY; JAMES H. GARRETT, INDIVIDUALLY; HAROLD K. POOVEY, SAM DULA, GENE SMITH, MRS. LOIS YOUNG, MRS. MARTHA KARSLAKE, JAMES H. GARRETT AND DR. DONALD G. HAYES, MEMBERS OF THE BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT

No. 7825SC172

(Filed 20 February 1979)

1. Rules of Civil Procedure §§ 12, 56— motion treated as summary judgment motion

The Court of Appeals converted defendants' Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment by considering on appeal the facts asserted in plaintiffs' brief in addition to the allegations of the complaint.

2. Schools § 13— failure of student to comply with dress code—exclusion from graduation by principal

In an action to recover for mental and emotional distress allegedly resulting from defendant school principal's action in excluding plaintiffs' son from high school graduation ceremonies because he allegedly did not comply with the dress code established by defendant principal which required male

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graduates to wear "dress pants as opposed to jeans," defendants were entitled to summary judgment where plaintiffs' brief, which stated that their son wore "brushed denim pants" to the graduation ceremony, negated their allegation that defendant principal wrongfully claimed that their son was not properly attired.

APPEAL by plaintiffs from *Ferrell, Judge*. Orders entered 28 December 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 29 November 1978.

It appears from the complaint that plaintiffs' son, Joe C. Fowler, Jr., was eligible to graduate and was scheduled to participate in the graduation ceremony of Hickory High School on 2 June 1977. Plaintiffs were present in the school auditorium for the graduation ceremony. The defendant Williamson, school principal, aided and abetted by defendant Mason, assistant, would not permit plaintiffs' son to participate in the graduation ceremony, claiming that he was not properly attired.

Plaintiffs alleged that the named defendants acted intentionally, willfully and maliciously, causing plaintiffs to suffer public embarrassment and severe mental and emotional distress, which aggravated a pre-existing heart condition of the male plaintiff, and which were reasonably foreseeable by said defendants.

The plaintiffs appeal from orders dismissing the action pursuant to Rule 12(b)(6) motions made by all defendants.

Isenhower and Long by Samuel H. Long III for plaintiff appellants.

A. Terry Wood and Patrick, Harper & Dixon by James T. Patrick for defendant appellees, Board of Education and Individual Board Members.

Golding, Crews, Meekins, Gordon & Gray by E. F. Parnell and Chambers, Stein, Ferguson and Becton by James C. Fuller, Jr. for defendant appellees, Williamson, Mason and Wishon.

CLARK, Judge.

In granting the G.S. 1A-1, Rule 12(b)(6) motions of all defendants the trial court determined that plaintiffs failed to allege an actionable claim for mental and emotional distress resulting from defendant principal's action in excluding their son from the grad-

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uation ceremony. In considering a Rule 12(b)(6) motion all the allegations of the complaint are taken as true. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The test is whether the pleading is legally sufficient. *Alltop v. J. C. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied* 279 N.C. 348, 182 S.E. 2d 580 (1971).

[1] But we do not decide whether the trial court erred in granting the motions, because the plaintiffs have filed a brief setting forth many facts other than those alleged in the complaint. Statements of fact made in briefs, and legitimate inferences therefrom, may be assumed as true as against the party asserting them. 5 C.J.S., Appeal and Error § 1343-45. See *Garner v. Weston*, 263 N.C. 487, 139 S.E. 2d 642 (1965). In the interest of the prompt elimination of a factually unfounded claim, we elect to consider on appeal the facts asserted in plaintiffs' brief, in addition to the allegations of the complaint. Where extraneous matter is received and considered on a Rule 12(b)(6) motion to dismiss, the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in G.S. 1A-1, Rule 56. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971)

[2] Having converted defendants' Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, the question on appeal is whether there is a genuine issue as to any material fact. Extraneous matter apart from the allegations of the complaint considered in determining this question consists of admitted facts in plaintiffs' "Statement of Facts" in their brief as follows:

"The Appellee Williamson, Principal of Hickory High School refused to allow the Appellants' son to participate in the ceremonies, removing the young man from the processional line a few minutes before the scheduled beginning of the ceremonies. The Appellee Williamson approached the Appellants' son, raised the gown he was wearing and informed the student that he was not properly attired according to a dress code for the ceremonies which had been promulgated by the Appellee Williamson. The code required that male graduates wear: 'Dress pants as opposed to jeans, shirts and ties; shoes and socks.' The graduation instructions also required that students attend a graduation practice on June 1,

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1977, and an Awards Day ceremony on June 2 if they were to participate in the graduation ceremony the evening of June 2, 1977. The Appellants' son, under his graduation gown, wore a pair of brushed denim pants such as is commonly worn for dress occasions as part of a brushed denim suit and a pair of brown leather dress boots and socks, as well as a white dress shirt and solid dark tie; he had complied with the attendance requirements at the previous events. Several students who were allowed to graduate had not attended the previous events. Appellants' son was the only student not allowed to participate in the graduation ceremonies.

After being removed from the line of prospective graduates the Appellants' son returned home and changed clothes, but by the time he returned to the auditorium most of the graduates had entered the hall and the Appellee Mason, an Assistant Principal, refused to allow young Fowler to enter and take his place with his classmates.

Although the Appellants were not physically present at the place where the Appellee removed their son from the line of graduates they were present in the Auditorium, and when the processional began, some ten to twelve minutes after the above-described incident, they immediately became aware that their son was not in the line of graduates. The Appellants sent their daughter to investigate their son's absence and upon learning the reason therefor became extremely emotionally distressed and upset."

It is clear from the statement of the facts that defendant school principal had adopted a dress code for the graduation ceremony which required that the male members of the graduating class, including plaintiffs' son, wear "dress pants as opposed to jeans."

The right to attend school and claim the benefits of the public school system is subject to lawful rules prescribed for the government thereof. The legislature has control over the public schools and may delegate the power to make rules to local administrative officers. *Coggins v. Board of Education*, 223 N.C. 763, 28 S.E. 2d 527 (1944). See G.S. 115-35 for delegation of powers and duties to local administrative units.

Local school boards and school officials have the implied right to adopt appropriate and reasonable rules and regulations

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for the purpose of carrying out their powers and duties. G.S. 115-146 imposes upon principals and teachers the duty to maintain good order and discipline and may use reasonable force in so doing. This statute was held to be constitutional on its face in *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd* 423 U.S. 907, 46 L.Ed. 2d 137, 96 S.Ct. 210 (1975).

The principal of a local school may adopt reasonable rules and regulations in the exercise of his powers and duties concerning matters not provided for and not inconsistent with the rules provided by higher authority. 79 C.J.S., Schools and School Districts, § 494.

It has been established that a school may adopt a dress code and may exclude a student from participating in certain school programs, including graduation ceremonies, if the student does not comply with the dress code. *Hill v. Lewis*, 323 F. Supp. 55 (E.D. N.C. 1971); *Valentine v. Independent School District*, 191 Iowa 1100, 183 N.W. 434 (1921); *Christmas v. El Reno Board of Educ.*, 313 F. Supp. 618 (W.D. Okla. 1970), *aff'd* 449 F. 2d 153 (1971); *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Ark. 1970).

The complaint alleges that the defendant school principal "wrongfully claimed and alleged that plaintiffs' son was not properly attired so as to be permitted to participate in said ceremonies. . . ." The complaint does not allege, but the stated facts establish, that there was a dress code for the graduation ceremony. There is no claim that the dress code was unreasonable or in violation of due process or any other right of plaintiffs or their son. The complaint does allege that the school principal *wrongfully* claimed that plaintiffs' son was not properly attired but this allegation is negated by the admitted facts in plaintiffs' brief.

The dress code required that plaintiffs' son wear "dress pants as opposed to jeans" for the graduation ceremony. The son wore, according to the stated facts, "a pair of brushed denim pants." Most words have recognized variations of meaning, but we are unable to find any authority in law or semantics which recognizes "denim pants," brushed or unbrushed, to mean "dress pants as opposed to jeans." Webster's Third New International Dictionary (1968) defines "jean" as "pants usually made of jean or denim and worn for work or sports", and defines "denim" as

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"overalls or trousers usually of dark blue denim for work or rough use." Admittedly these definitions have been somewhat eroded by the widespread wear of denim jeans during the last decade by young people for purposes other than work or sports, but they have yet to achieve the status of "dress pants as opposed to jeans," which are commonly worn to formal or ceremonial functions.

We find that defendant Williamson, as principal of Hickory High School, established a lawful and valid dress code for eligible graduates participating in the graduation ceremony. Neither his right to do so nor the legality of the dress code as adopted is attacked by the complaint. The plaintiffs' son appeared for the graduation ceremony attired in violation of the code in that he did not wear dress pants as required but instead wore denim jeans. The defendant principal had the legal right to exclude plaintiffs' son from the graduation ceremony for violation of the dress code, and in doing so he did not *wrongfully* claim that the son was not properly attired, as alleged in the complaint. The discretion of a school principal should not be unduly restricted in determining the violation of a rule or regulation.

The exercise of a legal right cannot constitute a tort even if there is a wrongful intent. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954), *petition for rehearing dismissed* 242 N.C. 123, 86 S.E. 2d 916 (1955); *Evans v. Morrow*, 234 N.C. 600, 68 S.E. 2d 258 (1951).

We note that plaintiffs' claim is based on the allegation of tortious conduct by defendant Williamson, the school principal, in excluding plaintiffs' son from the graduation ceremony when the son first appeared in brushed denim pants, and not in excluding him when he, after changing to dress pants, reappeared as the ceremony was in progress.

We conclude that the facts admitted by the plaintiffs in their brief negate the allegations of the complaint that the defendant school principal acted wrongfully in excluding plaintiffs' son from the graduation ceremony, and since the admitted facts establish a factually unfounded claim without a genuine issue of fact this action should be summarily and finally determined by this Court.

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In electing to consider the facts admitted in plaintiffs' brief, we do not infer that the complaint states a cause of action. We do not find it necessary in this case to determine whether plaintiffs could recover for emotional distress as a result of intentional wrong to their son when they were not present at the time the act occurred.

Finally, it is noted that plaintiffs' son sued the defendants under a civil right statute seeking compensatory damages in the United States District Court. The action was dismissed for failure to state a claim. *Fowler v. Williamson*, 448 F. Supp. 497 (W.D. N.C. 1978).

The orders dismissing the action pursuant to Rule 12(b)(6) as to all defendants are vacated, and this cause is remanded for entry of summary judgment against plaintiffs in favor of all defendants.

Reversed and remanded.

Judges MITCHELL and WEBB concur.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC CO., INC. v. J. M. GRIFFIN, T/A GRIFFIN TRANSFER AND STORAGE COMPANY AND GRIFFIN TRANSFER AND STORAGE COMPANY, INC.

No. 7825SC338

(Filed 20 February 1979)

Rules of Civil Procedure § 37 — failure to make discovery — sanctions

In this action to recover damages for the destruction by fire of equipment stored in defendant's warehouse, the trial court properly held plaintiffs in contempt and imposed sanctions pursuant to G.S. 1A-1, Rule 37(b)(2)e for failure to comply with an order compelling discovery where the court ordered plaintiffs to disclose whether a "standard fire insurance policy with a standard extended coverage" was in effect at the time of the alleged loss, plaintiffs answered that they had no knowledge of "any standard fire insurance policy with a standard extended coverage" in effect at the time of the loss, and, in answer to a further interrogatory as to whether plaintiffs had any insurance covering the lost equipment, plaintiffs thereafter disclosed that five policies affording "all risks" coverage for the equipment were in effect on the date of the loss and that \$15,560 had been paid under those policies.

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APPEAL by plaintiffs from *Ferrell, Judge*. Orders entered 15 September 1977 and 14 November 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals on 18 January 1979.

This is an appeal from Orders finding the plaintiffs in contempt and imposing sanctions pursuant to G.S. § 1A-1, Rule 37(b)(2)e for plaintiffs' failure to comply with an Order compelling discovery. After a hearing on defendant's motion to show cause why plaintiffs should not be held in contempt and for imposition of sanctions, Judge Forrest A. Ferrell, in an Order entered on 15 September 1977, made findings of fact which, except where quoted, are summarized below:

On 21 November 1974, plaintiffs instituted an action to recover \$25,560.68 in damages for the destruction of certain equipment as a result of a fire at defendant's warehouse. The equipment had been stored at the warehouse pursuant to a written warehousing contract. Article II, paragraph 4(a) of the contract provides in part: "The Contractor as a warehouseman, however, shall not be liable for any loss, damage or other delay to material by fire or other hazards insurable under a standard fire insurance policy with standard extended coverage." On 6 June 1975, defendants filed their "First Set of Interrogatories" which contained the following question:

State whether or not there is in existence any insurance agreement under which any person carrying on an insurance business may be liable to satisfy all or any part of the loss sustained by the plaintiff arising out of the facts and circumstances alleged in the complaint, or is there in existence any agreement under which any person carrying on an insurance business may be liable to satisfy all or any part of a judgment which may be entered in this action in favor of the plaintiff against the defendant.

Defendant also requested copies of any such insurance policies.

On 12 June 1975, plaintiffs filed objections to these interrogatories on the grounds that "the information requested . . . is not of the kind or nature which can properly be discovered under Rule 26(b) of [the Rules of] Civil Procedure, and furthermore, such requested information, and all of it, would be improper, inadmissible, and prejudicial to the rights of plaintiffs."

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On 29 January 1976, Judge Robert W. Kirby, after a hearing, entered an Order providing in part "that said objections should be allowed and that plaintiffs should not be required to answer interrogatories as submitted." Judge Kirby's Order further provided, however, "that the plaintiffs be required and are here required to disclose whether or not a standard fire insurance policy with a standard extended coverage was in full force and effect at the time of the alleged loss and to disclose the name of any such insurance carriers."

On 23 April 1976, plaintiffs filed "Answer to Order and Interrogatories Submitted by Defendant" which stated: "Plaintiffs have no knowledge of any standard fire insurance policy with a standard extended coverage in force and effect at the time of the alleged loss, unless same was issued to defendants or one of said defendants." This answer "was signed for plaintiffs by J. R. Todd, Attorney, and was verified by Albert F. Martin, 'Mgr. Corp. Insurance of American Telephone & Telegraph Co. and/or Western Electric Co., Inc.' verifying that such answer was true to the best of his knowledge and belief."

On 14 July 1976 defendants filed a "Second Set of Interrogatories" to which plaintiffs again objected on the grounds that "said interrogatories are irrelevant, and immaterial, and prejudicial to the rights of plaintiff." On 11 February 1977, Judge Kirby entered an Order requiring the plaintiffs to answer certain of the interrogatories, among which was: "State whether plaintiffs, on May 9, 1972 had *any* insurance covering the equipment plaintiffs contended was lost by fire on that date." Plaintiffs' response was: "Yes, subject to a \$10,000.00 deductible." Plaintiffs further answered that in March and April of 1973, \$15,560.86 had been paid to them by five separate insurance companies and attached copies of certain insurance policies to their answers to the interrogatories. The policies attached were "entitled as follows: (a) for Highland Insurance Company, a 'scheduled Property Floater Policy,' (b) for Great American Insurance Companies, an 'inland marine policy,' (c) for St. Paul Fire & Marine Insurance Co., Continental Insurance Co., and United States Fire Insurance Co., a 'Joint Policy of Insurance.'" Each of these policies "extends 'coverage' against all risks or physical loss and/or damage from any cause whatsoever to plaintiffs' property whether in transit or temporarily at a location awaiting installation." The existence "of

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insurance coverage to the plaintiffs [for loss] as a result of fire on the occasion complained of, is material evidence in the trial of this action, as it may be a complete or partial defense to the right, if any, of plaintiffs to recover of defendants."

Based on the above findings of fact, Judge Ferrell made conclusions of law, the pertinent portions of which are quoted below:

3. On January 29, 1976, the Order of Judge Kirby required plaintiffs to provide information as to whether a "standard fire insurance policy with a standard extended coverage was in full force and effect."

4. In light of the admissions of plaintiffs filed April 23, 1976, the court concludes that the Answer and Response of plaintiffs dated March 10, 1976, to the Order of Judge Kirby was a failure to comply with the Order of the Court, in that the answer provided was either evasive or incomplete, and thus a failure to answer as per Rule 37 a (3); or simply a failure to answer directly.

5. The fact that the coverage afforded by the policies was an "all risks" coverage does not mean that plaintiffs may be permitted to avoid affording the information requested simply because the policies were not called, named, denominated, or entitled "standard fire insurance policies with standard extended coverage." . . .

6. The defendants were entitled to know whether there was coverage, provided by insurance, for loss by fire to plaintiffs' property on the occasion complained of, and the attempt by the plaintiffs to rest upon a procedural technicality or upon semantics or upon any other cause in their failure to properly and fully respond, was in bad faith and calculated and designed not to afford the defendants material evidence which may reasonably go to the merits of their defense to a portion or the whole of plaintiffs' claim.

7. Further, the court concludes that the failure of the plaintiffs to provide the Answer, if not contemptuous, was at least a violation of the spirit of the Rules of Civil Procedure. Whether [the policies revealed in response to Judge Kirby's second Order] in law apply to this litigation is a question for the court and not for the plaintiffs to determine; and the

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policy or policies are an element of the dispute between the parties that cannot be determined on the merits without their disclosure, and unless their existence is known.

8. Further, the court concludes that the failure to answer the Order of Judge Kirby was not by reason of inability to comply, but was rather, a willful failure to comply.

Judge Ferrell then ordered that plaintiffs be sanctioned pursuant to Rule 37(b)(2)e, the extent of which "shall be that the plaintiffs are required to pay the defendants the reasonable expenses, including attorney's fees, caused by the plaintiffs' failure to comply with the Order of Judge Kirby dated January 29, 1976." An Order fixing the exact amount of the sanctions imposed was entered on 14 November 1977. Plaintiffs appealed.

Townsend, Todd and Vanderbloemen, by J. R. Todd, Jr., for plaintiff appellants.

Wayne W. Martin for defendant appellees.

HEDRICK, Judge.

The assignments of error brought forward and argued in plaintiffs' brief are all based on a single exception to the Order entered 15 September 1977 finding plaintiffs in contempt and imposing sanctions. Such a broadside exception does not present for review the sufficiency of the evidence to support the findings of fact but presents only the question whether the facts found or admitted support the conclusions of law and the judgment. *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967); *Johnson v. Johnson*, 17 N.C. App. 398, 194 S.E. 2d 562 (1973); 1 Strong's N.C. Index, *Appeal and Error* § 28 (3d Ed. 1976).

The question thus presented in this appeal is whether the facts found by Judge Ferrell support the judgment holding plaintiffs in contempt and imposing sanctions pursuant to Rule 37(b)(2)e, which provides:

Sanctions by Court in which Action is Pending.—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule

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35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

e . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The facts found by Judge Ferrell clearly demonstrate that plaintiffs violated at least the spirit of Judge Kirby's first Order when they responded that they had "no knowledge of any standard fire insurance policy with a standard extended coverage." The findings reveal that a genuine issue of fact existed with regard to whether the property involved in plaintiffs' claim was covered by fire insurance. Whether the existence of such insurance would be a defense to plaintiffs' claim could only be determined at trial. By denying the existence of "standard fire insurance with standard extended coverage" the plaintiffs unilaterally determined a question that could only be determined by the trial court. As Judge Ferrell aptly stated in his 15 September 1977 Order:

Whether or not the policy or policies [of insurance revealed in response to Judge Kirby's second Order] in law apply to this litigation is a question for the court and not for the plaintiffs to determine; and the policy or policies are an element of the dispute between the parties that cannot be determined on the merits without their disclosure, and unless their existence is known.

One of the primary purposes of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 987, 2 L.Ed. 2d 1077, 1082 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-501, 67 S.Ct. 385, 388, 91 L.Ed. 451, 457 (1947); 4 Moore's Federal Practice § 26.02[1](2d Ed.

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1978); 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2001 (1970). "Emphasis in the new rules is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E. 2d 191, 200 (1976).

When viewed in light of the purposes of discovery, plaintiffs' refusal to disclose the existence of the insurance policies cannot be justified. Plaintiffs nowhere attempt to argue that the policies in question are not relevant or material to the resolution of a key issue in the case. To permit a party to refuse to disclose relevant factual information in this type of situation would serve to reinject the "sporting element" into trials and would utterly defeat the purposes for which the new discovery rules were enacted.

Finally, we note the discovery rules "should be constructed liberally" so as to substantially accomplish their purposes. *Willis v. Duke Power Co.*, 291 N.C. at 34, 229 S.E. 2d at 200. The administration of these rules lies necessarily within the province of the trial courts; Rule 37 allowing the trial court to impose sanctions is flexible, and a "broad discretion must be given to the trial judge with regard to sanctions." 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2284, at 765 (1970). See also 4A Moore's Federal Practice, § 37.03 [2.-7](2d Ed. 1978).

We conclude that Judge Ferrell's findings of fact support the conclusions of law, and the Orders imposing sanctions are affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

State v. Hall

STATE OF NORTH CAROLINA v. KENNETH VICTOR HALL

No. 786SC843

(Filed 20 February 1979)

1. Constitutional Law § 55— 15 months between mistrial and second trial—no motion for speedy trial—waiver

Defendant was not denied his right to a speedy trial by the passage of fifteen months from the date of a mistrial until the date of his second trial, since the length of the delay alone would not constitute a denial of the right to a speedy trial; the superior court in which defendant was tried held criminal sessions only four times a year and the second trial was at the fifth criminal session; defendant waived any claims to undue delay where he moved for speedy trial before the first trial but did not make a further motion between the two trials; defendant showed no prejudice resulting from the delay since he was imprisoned on another conviction while awaiting trial and thus was not deprived of his liberty and since the testimony defendant sought to gain from a named witness, which he claimed was made unavailable by the State's delay, could have been merely corroborative; and defendant failed to meet the burden of showing that the delay was due to neglect or willfulness on the part of the State.

2. Constitutional Law § 48— defendant without counsel for 12 months—inability of counsel to obtain testimony—effective assistance of counsel not denied

Defendant was not denied the effective assistance of counsel because he had no appointed counsel between the time of a mistrial and his second trial or because counsel appointed for the second trial was unable to secure the testimony of a codefendant who had previously been acquitted, since counsel was appointed for defendant three months before the date of the second trial; counsel had adequate time to prepare for trial; and the missing codefendant's testimony would probably have been only of corroborative value.

APPEAL by defendant from *Lee, Judge*. Judgment entered 7 October 1977 in Superior Court, HERTFORD County. Heard in the Court of Appeals 10 January 1979.

Defendant was indicted for armed robbery, felonious conspiracy, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and discharging a firearm into an occupied dwelling. The indictments were returned by the grand jury at the 23 February 1976 criminal session of Hertford County Superior Court. At that session, the State called the defendant's cases for armed robbery and felonious conspiracy, together with codefendants Travis Lane Watford and Ronald Earl Jenkins, on the same charges. Codefendant Jenkins discharged his court-appointed counsel and the trial court continued all cases for the session.

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Counsel for defendant made a motion for a speedy trial on 9 March 1976. The next session of superior court was held during the week of 12 April 1976, and the State elected to try Jenkins, the purported triggerman, and the cases against this defendant and the other codefendants were continued. The next session was held on 12 July 1976, and the defendant and codefendant Watford were arraigned and tried. Jenkins was convicted of armed robbery in the earlier trial, while a fourth codefendant, Askew, although indicted has never been tried. The defendant pled not guilty. The jury found him guilty of the felonious conspiracy charge, but failed to reach a verdict on the charge of armed robbery. A mistrial on that charge was declared by the trial judge. Watford was found not guilty on the felonious conspiracy charge and the armed robbery charge was dismissed after a mistrial was declared.

The defendant was subsequently tried on the armed robbery charge at the 3 October 1977 criminal session of Hertford County Superior Court. This was the fifth criminal session of court since the first trial of the defendant. At this trial, the defendant was represented by counsel appointed for him at the 11 July 1977 criminal session. (The original counsel for the defendant had perfected the defendant's appeal on the felonious conspiracy conviction.) The jury found the defendant guilty of armed robbery and the court sentenced him to forty years in the Department of Correction. This term was to run concurrently with any other terms being served by the defendant.

The evidence for the State on the armed robbery charge tended to show that on or about 8 November 1975, Walter Liverman, a restaurant owner in Murfreesboro, was shot and robbed of his cash box by Ronald Jenkins and Jerome Askew. Although seriously wounded, Mr. Liverman survived. A reward was subsequently posted for information leading to an arrest and conviction in the robbery. Such reward led one of the codefendants, Jerome Askew, to make a statement which implicated Jenkins as the triggerman and Watford and the defendant as leading participants in the crimes.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

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Attorney General Edmisten, by Assistant Attorneys General Elizabeth C. Bunting and James Peeler Smith, for the State.

Rosbon D. B. Whedbee, for defendant.

CARLTON, Judge.

[1] Defendant's first assignment of error is that the trial judge improperly denied his motion to dismiss the indictment because he had been denied his constitutional right to a speedy trial. He asserts that the passage of fifteen months from the date of the mistrial until the date of the second trial was an unjustifiable and inexcusable delay on the part of the State. He further contends that the delay prejudiced him because he was unable to ascertain the location and thus secure the testimony of the acquitted codefendant, Watford.

We find no merit in defendant's position. The law concerning the Sixth Amendment right to a speedy trial is well established in North Carolina. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969) enumerates four factors to be considered along with calendar time when reviewing an alleged violation of the right to speedy trial: length of delay, cause of delay, waiver by the defendant and prejudice to the defendant.

Under the facts before us, even if only the length of the delay were considered, a fifteen-month delay from defendant's first trial to second trial would not alone constitute a denial of the right to a speedy trial. *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied* 429 U.S. 1049, 97 S.Ct. 760, 50 L.Ed. 2d 765 (1977).

Hertford County Superior Court held criminal sessions only four times a year, and the second trial was at the fifth criminal session. Furthermore, the defendant waived any claims to undue delay. The only motion for a speedy trial was made on 9 March 1976, prior to the first trial. Thereafter, trial was scheduled for the defendant and codefendant Watford for April, 1976. The State then elected to try the alleged triggerman, Jenkins, alone and the trial for Watford and the defendant was held in July 1976. The March 1976 motion was honored and dissolved by the July 1976 trial. No further motions for speedy trial were made during the fifteen-month period from the date of the first trial, 12 July 1976, until 3 October 1977, the date of the second trial.

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Finally, the defendant has shown no prejudice resulting from the delay. He was imprisoned on the conspiracy conviction while awaiting trial, and thus was not deprived of his liberty. There was no evidence that a detainer was filed which might jeopardize his chances for parole and work release or affect the accumulation of good behavior credits. *State v. Wright, supra*. Furthermore, the testimony the defendant sought to gain from Watford, which he claims was made unavailable by the State's delay, could have been merely corroborative of five other witnesses whose testimony supported the defendant's alibi defense.

Defendant also failed to meet the burden of showing that the delay was due to neglect or willfulness on the part of the State. *State v. Eppley*, 30 N.C. App. 217, 226 S.E. 2d 675 (1976); *State v. Arnold*, 21 N.C. App. 92, 203 S.E. 2d 395 (1974). He has also failed to negate the inference of waiver and to show prejudice in the preparation and presentation of his defense which resulted from the delay.

No general principle fixes the exact time within which a trial must be had. Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. 22A C.J.S., Criminal Law, § 467(4), pp. 24, 25, 30.

The trial court committed no abuse of discretion in denial of the motion to dismiss. This assignment of error is overruled.

[2] Defendant argues that he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. We disagree.

Defendant bases this contention on the fact that he had no appointed counsel between trials and that defense counsel appointed for the second trial was unable to secure the testimony of codefendant Watford.

The right to assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution. The Sixth Amendment guarantee is made applicable to the states by the Fourteenth Amendment to the United States Constitution. *Gid-*

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eon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). However, the guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740 (1967), *cert. denied* 390 U.S. 1030, 88 S.Ct. 1423, 20 L.Ed. 2d 288 (1968). The record in this case shows that the defendant was represented by privately retained counsel at his first trial and by court appointed counsel for the second trial. The appointment of counsel for the second trial took place three months before the date of the second trial. The Sixth Amendment guarantee is not one of a specified time for trial preparation. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). Certainly, in the instant case, counsel for defendant had ample time for trial preparation. Indeed, a review of the record discloses that the defendant was not denied his Sixth Amendment right to counsel during any critical stages of the proceedings against him.

The fact that defense counsel was unable to ascertain the whereabouts and thus secure the testimony of codefendant Watford does not strengthen defendant's claim that he was denied effective assistance of counsel. As stated previously, the codefendant Watford's testimony would probably have only been of corroborative value. Even if the testimony had been valuable, three months would have been more than enough time for defense counsel to seek the witness's return. Defendant's denial of the effective assistance of counsel argument is without merit.

Defendant also assigns as error the denial of his motion to suppress the testimony of State's witness Jerome Askew, a codefendant never brought to trial, and Jewell Askew, the codefendant's grandfather. The defendant contends that the testimony of Jerome Askew should have been suppressed because of inconsistencies in testimony between the two trials, the consumption of alcohol on the night in question, and bias in the outcome of defendant's trial. The defendant further contends that the testimony of Jewell Askew should have been suppressed due to the familial relationship between Jerome and Jewell Askew. These arguments are without merit. The objections of the defendant go to credibility of the witness, a matter properly addressed through cross-examination, and not to the competency of the witness. 1 Stansbury, N. C. Evidence 2d (Brandis Revision) §§ 44, 46.

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As the testimony was relevant and its reception was not forbidden by any specific rule of law, these assignments of error are overruled. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951).

Defendant offers no authority for most of his remaining assignments of error. We have reviewed all of them and they are without merit. Defendant received a fair trial, free from prejudicial error.

In the trial of the case below, we find

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 FEBRUARY 1979

BANK v. SPRINGSTEAD No. 7813DC152	Brunswick (77CVM391)	Vacated and Remanded
BRANTLEY v. NEAL No. 781SC274	Dare (77CVS10)	Affirmed
IN RE JONES No. 7814DC892	Durham (78SP326)	Reversed
RANKIN v. RINK and BALLARD v. RINK No. 7826DC73	Mecklenburg (75CVD1839) (75CVD1731)	Affirmed
STATE v. BLOUNT No. 782SC872	Beaufort (78CRS4443) (78CRS4445) (78CRS4446)	No Error
STATE v. BRIGGS No. 7829SC917	Transylvania (78CRS535) (78SRS538)	No Error
STATE v. BROWN No. 7826SC825	Mecklenburg (78CRS2741)	No Error
STATE v. CARRIKER No. 7919SC905	Randolph (77CRS6151)	Dismissed
STATE v. CARTER No. 784SC800	Duplin (77CRS7189)	No Error
STATE v. CUNNINGHAM No. 7821SC952	Forsyth (78CR7679)	Dismissed
STATE v. GILL No. 7826SC826	Mecklenburg (77CRS3020)	Reversed
STATE v. HAILEY No. 7820SC860	Union (78CRS3383)	Dismissed
STATE v. HODGES No. 7829SC846	Henderson (78CRS1206)	No Error
STATE v. JEFFUS No. 7818SC690	Guilford (77CRS29464)	No Error
STATE v. KEE No. 7827SC896	Cleveland (76CRS12643)	No Error
STATE v. McALLISTER No. 7816SC845	Scotland (78CR1471)	No Error

STATE v. MASON No. 783SC820	Carteret (77CR9245) (77CR9167)	No Error
STATE v. MOCK No. 7815SC794	Alamance (76CRS14765)	New Trial
STATE v. PARSONS No. 7825SC879	Caldwell (78CR134)	No Error
STATE v. PEARSON No. 7816SC897	Scotland (77CR7605) (77CR7606) (77CR7607)	No Error
STATE v. PRIDDY No. 7810SC802	Wake (77CRS38599)	No Error
STATE v. REVELS No. 7816SC929	Robeson (78CR0039)	Dismissed
STATE v. ROBINSON No. 7814SC838	Durham (78CRS588)	No Error
STATE v. WILLIAMS No. 789SC514	Warren (77CR1035)	No Error
STATE v. YORK No. 784SC853	Onslow (77CR16919) (77CR16920)	No Error
STATE v. YOW No. 7820SC856	Union (78CR3578) (78CR3579)	Dismissed No Error
STRICKLAND v. TANT No. 787DC298	Nash (76CVD739)	Affirmed
STROUPE v. STROUPE No. 7825DC245	Burke (76CVD834)	Vacated
TYRAS v. TYRAS No. 785DC213	New Hanover (77CVD2067)	Error and Remanded

FILED 20 FEBRUARY 1979

AUSTIN v. AUSTIN No. 785DC315	New Hanover (77CVD895) (77CVD1801)	Vacated and Remanded
BOYD v. BOYD No. 7820DC221	Union (77CVD0171)	Affirmed
HEADEN v. JOHNSON No. 7826SC310	Mecklenburg (77CVS7901)	Affirmed

RILES v. RILES No. 7812DC265	Cumberland (76CVD1406)	No Error
SIMPSON v. LEE No. 7820SC193	Anson (68SP51)	Affirmed
STATE v. ACREY No. 787SC962	Edgecombe (78CRS3850) (78CRS3851)	Vacated and Remanded
STATE v. ADAMS No. 785SC1006	New Hanover (78CR4817)	No Error
STATE v. BROWN No. 7816SC907	Robeson (76CR18721)	No Error
STATE v. CARROLL No. 7827SC1028	Cleveland (77CRS14079) (78CRS761)	No Error
STATE v. DICKERSON No. 786SC967	Hertford (77CR1933A)	No Error
STATE v. DOUGLAS No. 7825SC911	Caldwell (77CR9085)	Affirmed
STATE v. EASON No. 787SC921	Wilson (77CR9360)	No Error
STATE v. GRIFFIN No. 7823SC974	Wilkes (78CRS2204)	No Error
STATE v. HILL No. 7818SC756	Guilford (76CRS16454)	No Error
STATE v. HORNE No. 7820SC942	Anson (78CRS0817)	New Trial
STATE v. HUNT No. 7816SC908	Robeson (76CR12524)	No Error
STATE v. HUNT No. 7818SC985	Guilford (77CRS45509)	No Error
STATE v. KING No. 7817SC757	Surry (77CR8745)	No Error
STATE v. LEFFINGWELL No. 7812SC924	Cumberland (76CR2367)	No Error
STATE v. McCRAY No. 7821SC727	Forsyth (78CR7315) (78CR10824)	No Error
STATE v. PETERSON No. 786SC992	Hertford (78CRS1045)	No Error

STATE v. PETERSON No. 785SC1005	New Hanover (78CR4816)	No Error
STATE v. WADDY No. 7828SC1000	Buncombe (78CRS6177)	No Error
WRIGHT v. INSURANCE CO. No. 7818SC300	Guilford (77CVS1538)	Affirmed
YOUNCE v. YOUNCE No. 7825DC328	Catawba (77CVD505)	Affirmed

APPENDIX

**AMENDMENT TO RULES
OF APPELLATE PROCEDURE**

AMENDMENT TO
RULES OF APPELLATE PROCEDURE

Rule 30(e) of the North Carolina Rules of Appellate Procedure, reported in 288 N.C. 737, is amended by the addition of a new subsection (3) as follows:

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

This amendment to the Rules of Appellate Procedure was adopted by the Supreme Court in Conference on 5 February 1979 to become effective upon adoption. The amendment shall be promulgated by publication in the next succeeding advance sheets of the Supreme Court and the Court of Appeals.

BROCK, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N. C. Index 3d.

<p>ACCOUNTS ADMINISTRATIVE LAW APPEAL AND ERROR APPEARANCE ARREST AND BAIL ARSON ASSAULT AND BATTERY ASSIGNMENTS FOR BENEFIT OF CREDITORS ATTORNEYS AT LAW AUTOMOBILES</p> <p>BAILMENT BANKS AND BANKING BASTARDS BOUNDARIES BURGLARY AND UNLAWFUL BREAKINGS</p> <p>COLLEGES AND UNIVERSITIES CONSPIRACY CONSTITUTIONAL LAW CONTEMPT OF COURT CORPORATIONS CRIME AGAINST NATURE CRIMINAL LAW</p> <p>DAMAGES DECLARATORY JUDGMENT ACT DEEDS DIVORCE AND ALIMONY</p> <p>ELECTIONS ELECTRICITY ESTOPPEL EVIDENCE EXECUTORS AND ADMINISTRATORS</p> <p>FIDUCIARIES FIRES FRAUD FRAUDULENT CONVEYANCES</p> <p>GAS GUARANTY</p> <p>HOMICIDE</p> <p>INDICTMENT AND WARRANT INFANTS INSANE PERSONS INSURANCE</p>	<p>JOINT VENTURES JUDGES</p> <p>KIDNAPPING</p> <p>LABORERS' AND MATERIALMEN'S LIENS LANDLORD AND TENANT LARCENY LIBEL AND SLANDER LIMITATION OF ACTIONS</p> <p>MASTER AND SERVANT MORTGAGES AND DEEDS OF TRUST MUNICIPAL CORPORATIONS</p> <p>NARCOTICS NEGLECTANCE</p> <p>PARENT AND CHILD PARTIES PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS PLEADINGS PROCESS PROPERTY PUBLIC OFFICERS</p> <p>RAILROADS RAPE RECEIVING STOLEN GOODS REFERENCE REFORMATION OF INSTRUMENTS ROBBERY RULES OF CIVIL PROCEDURE</p> <p>SCHOOLS SEARCHES AND SEIZURES SOCIAL SECURITY AND PUBLIC WELFARE SOLICITORS</p> <p>TAXATION TRADEMARKS AND TRADE NAMES TRIAL TRUSTS</p> <p>UTILITIES COMMISSION</p> <p>VENDOR AND PURCHASER</p> <p>WATERS AND WATER COURSES WEAPONS AND FIREARMS</p>
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ACCOUNTS

§ 2. Accounts Stated

Where the trial court found that defendant acknowledged that he owed plaintiff \$1002, trial court erred in entering judgment for plaintiff for \$600. *Kirby v. Winston*, 206.

ADMINISTRATIVE LAW

§ 3. Authority of Administrative Boards in General

The Legislature did not expressly or impliedly grant the State Building Code Council power to amend the State Building Code so as to impose new and more stringent requirements upon existing buildings which complied with the Code and which were neither being altered nor changed in use. *Carolinas-Virginias Assoc. v. Ingram*, 688.

§ 4. Procedure, Hearings and Orders of Administrative Boards

Superior court had no authority to enter a stay order of the dismissal of an employee of the N.C. Dept. of Transportation before a final decision was entered by the State Personnel Commission. *Davis v. Dept. of Transportation*, 190.

Plaintiff riparian landowners were not entitled to judicial review of an informal fact finding hearing to determine whether defendant should initiate a proceeding to declare the Yadkin River Basin a capacity use area and to subject its water users to a permit-letting system. *High Rock Lake Assoc. v. Environmental Management Comm.*, 699.

§ 5. Availability of Review of Administrative Orders by Statutory Appeal

A fact finding hearing conducted by defendant to consider whether to initiate proceedings to declare the Yadkin River Basin a capacity use area was no more than a rule making type procedure and was not a contested case, and plaintiffs were not entitled to judicial review under the Administrative Procedure Act. *High Rock Lake Assoc. v. Environmental Management Comm.*, 699.

APPEAL AND ERROR

§ 6.6. Appeals Based on Motion to Dismiss

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not appealable. *Hankins v. Somers*, 617.

§ 16. Powers of Trial Court After Appeal

Where original defendants appealed dismissal of their third-party complaint but did not appeal a preliminary injunction, superior court retained jurisdiction to enforce the preliminary injunction while the appeal from the dismissal of the third-party complaint was pending. *Jacobs v. Sherard*, 464.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

By filing motions to disqualify plaintiffs' attorneys, defendants made a general appearance and waived their defense of lack of jurisdiction over the person. *Swenson v. Thibaut*, 77.

ARREST AND BAIL

§ 3.8. Legality of Warrantless Arrest for Drunk Driving

An officer had probable cause to arrest petitioner without a warrant for the misdemeanor of driving under the influence outside of the officer's presence. *In re Gardner*, 567.

ARSON

§ 4.2. Cases Where Evidence Was Insufficient

State's evidence was insufficient for the jury in a prosecution for unlawful burning of personal property where it showed only the willful burning of an automobile by defendant but failed to show any intent by defendant to injure or prejudice the owner of the automobile. *S. v. Murchinson*, 163.

ASSAULT AND BATTERY

§ 14.3. Sufficiency of Evidence of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury

State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where it showed defendant assaulted her sister with a lamp and with porcelain figurines. *S. v. Rhyne*, 319.

§ 15.2. Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury —Instructions

In a felonious assault case in which the indictment alleged that a lamp was the deadly weapon used and the evidence showed defendant used both a lamp and porcelain figurines, defendant was not prejudiced by the court's charge which permitted the jury to find that a porcelain figurine was the deadly weapon used in the assault. *S. v. Rhyne*, 319.

§ 15.5. Defense of Self; Instruction Required

Trial court erred in failing to instruct on self-defense in a prosecution for assault with a deadly weapon with intent to kill. *S. v. Dorsey*, 480.

§ 16.1. Submission of Lesser Offense Not Required

Trial court in a prosecution for assault with a deadly weapon properly found that a "keen bladed pocketknife" slapped across the victim's throat was a deadly weapon per se and properly failed to charge the jury on the lesser offense of assault inflicting serious injury. *S. v. Roper*, 256.

§ 18.1. Punishment for Assault on a Female

Statute providing for a fine and/or imprisonment for up to two years for an assault by a male over 18 upon a female does not deny males equal protection of the law. *S. v. Gurganus*, 395.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

§ 1. Transactions Operating as Assignment

An assignment of a note and deed of trust by a corporation to defendant bank was not an assignment for the benefit of creditors since the corporation at the time of the assignment retained substantial property. *Edwards v. Bank*, 261.

ASSIGNMENTS FOR BENEFIT OF CREDITORS — Continued**§ 2. Operation and Effect of Assignment**

An assignment of a note and deed of trust by a corporation to defendant bank and the transfer of cash did not constitute an unlawful preference. *Edwards v. Bank*, 261.

ATTORNEYS AT LAW**§ 3. Scope of Authority**

A law firm which represented an insurance company in rehabilitation proceedings was not prohibited from representing plaintiff minority shareholders of the corporation in a derivative action against the corporation's directors by Canon 4 of the Code of Professional Responsibility which prohibits the improper use of confidences of a client. *Swenson v. Thibaut*, 77.

§ 5.1. Liability for Malpractice

The statute of limitations for an action for legal malpractice in failing to file a suit until after it was barred by the statute of limitations began on the last date on which defendant attorney could have successfully filed the prior suit for plaintiff. *Stereo Center v. Hodson*, 591.

§ 7.1. Validity of Fee Agreements

A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against directors did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. *Swenson v. Thibaut*, 77.

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

An action to recover possession of demised premises upon a forfeiture for non-payment of rent was not an action "for the collection of any monies due" under the lease within the meaning of a lease provision relating to the recovery of attorney fees. *Green v. Lybrand*, 56.

§ 10. Disbarment Generally

A court's inherent power to discipline an attorney is not limited by technical precepts contained in the Code of Professional Responsibility. *Swenson v. Thibaut*, 77.

§ 12. Grounds for Disbarment

A law firm did not improperly solicit clients to be plaintiffs in an action by minority stockholders of a corporation. *Swenson v. Thibaut*, 77.

The privilege of an attorney to practice law in the appellate courts is suspended for 12 months and to practice in criminal cases in superior and district courts is suspended for 6 months because of his failure to perfect an appeal in each of four criminal cases in which he was appointed to represent the defendant on appeal. *In re Robinson*, 345.

The privilege of an attorney to practice law in this State is suspended for 90 days for his failure to perfect an appeal in a rape case involving the death penalty after having been appointed to represent defendant on appeal. *In re Dale*, 390.

AUTOMOBILES**§ 2.4. Revocation of License for Drunk Driving**

Petitioner's driving privilege was properly revoked by the division of Motor Vehicles because of his wilful refusal to take a breathalyzer test, and this was so whether or not his warrantless arrest for driving under the influence was legal. *In re Gardner*, 567.

§ 53.2. Failure to Stay on Right Side of Highway

Evidence was sufficient for the jury on the issue of minor defendant's negligence in the operation of a mini bike. *Honea v. Bradford*, 652.

§ 62.4. Striking Pedestrian Working on or About Street

A violation of G.S. 70-174(e) which requires a motorist to exercise due care to avoid hitting a pedestrian and to sound his horn when necessary may not be considered negligence per se. *Pope v. Deal*, 196.

§ 63.2. Striking Children on or About Road

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in failing to sound his horn upon seeing the nine-year-old plaintiff near the highway. *Lewis v. Dove*, 599.

§ 90.4. Instructions Not Supported by the Evidence

In an action to recover for personal injuries sustained by plaintiff pedestrian when she was struck by defendant's vehicle, trial court erred in submitting to the jury plaintiff's violation of G.S. 20-174.1 in instructing on the issue of contributory negligence. *Self v. Dixon*, 679.

§ 91.3. Instructions on Willful and Wanton Conduct

Evidence was sufficient for the jury on the issue of willful and wanton negligence where it tended to show that the drunken defendant struck plaintiff's vehicle after traveling 60 to 80 mph in a 35 mph zone. *Siders v. Gibbs*, 183.

§ 126.2. Breathalyzer Tests

Evidence was sufficient to support the trial court's conclusion that defendant willfully refused to submit to a breathalyzer test where it tended to show that defendant pretended cooperation. *Poag v. Powell, Comr. of Motor Vehicles*, 363.

§ 126.3. Breathalyzer Test; Time of Administration

Trial court properly found that petitioner "willfully" refused to submit to a breathalyzer test within the 30 minutes mandated by statute where the time elapsed while defendant was waiting for an attorney to return his call. *Seders v. Powell, Comr. of Motor Vehicles*, 491.

Petitioner's right to due process was not denied by the statute giving him a period of 30 minutes within which to contact an attorney before submitting to a breathalyzer test. *Ibid.*

§ 127.1. Driving Under the Influence; Sufficiency of Evidence

In a prosecution for driving under the influence, evidence was sufficient to show that defendant was driving a car at the time in question. *S. v. Atkinson*, 675.

§ 129. Driving Under the Influence; Instructions

In a prosecution for driving under the influence, defendant was not entitled, absent a request, to a special instruction informing the jury that they must con-

AUTOMOBILES – Continued

sider the condition of defendant at the time he made statements in determining the weight and credibility to be given those statements. *S. v. Atkinson*, 675.

§ 134. Unlawful Taking of Automobile

In a prosecution for unlawful possession of a stolen vehicle, an officer's testimony that he had checked with the police and sheriff's departments and determined that defendant was not an officer of either was incompetent hearsay, but the admission of such testimony was harmless error since the statutory provisions exculpating police officers who possess stolen vehicles in the performance of their duties is an exception to the statute and not an element of the offense. *S. v. Murchinson*, 163.

There was sufficient evidence that defendant knew or had reason to know that a vehicle was stolen to support his conviction for unlawful possession of a stolen vehicle. *Ibid.*

The doctrine of possession of recently stolen goods is applicable in a prosecution for unlawful possession of a stolen vehicle. *Ibid.*

BAILMENT

§ 3.3. Liabilities of Bailee to Bailor; Sufficiency of Evidence

In an action to recover for damages to knitting machines in a trailer being towed by defendant's truck, plaintiff's evidence (1) was sufficient to establish a bailment of its knitting machines, (2) made out a prima facie case of actionable negligence by defendant by showing the machines were undamaged when delivered to defendant, and (3) did not disclose that plaintiff was contributorily negligent as a matter of law in the manner in which it loaded the machines into the trailer. *Fabrics, Inc. v. Delivery Service*, 443.

BANKS AND BANKING

§ 3. Duties to Depositors

Plaintiff was a depositor of defendant bank and defendant was required to comply strictly with its agreement with plaintiff in making payments from the account. *Insurance Co. v. Bank*, 420.

Trial court properly concluded that funds in a checking account were not the property of a contractor but of plaintiff surety and that the funds were not subject to a levy by the IRS against the property of the contractor. *Ibid.*

§ 11. Liability for Mistaken Payment of Check

Where defendant bank made an unauthorized payment from plaintiff's account to the IRS, plaintiff had no duty to mitigate the damages by filing a claim for a refund with the IRS. *Insurance Co. v. Bank*, 420.

BASTARDS

§ 13. Legitimation

Defendant in a child support action was estopped to deny paternity of the child by his legitimation of the child pursuant to G.S. 49-12 and 49-13 after his marriage to the child's mother. *Myers v. Myers*, 201.

BOUNDARIES**§ 8. Nature of Proceedings to Establish**

Where a referee's report was rejected by the court as insufficient, the court was not required to order a further reference. *Reeves v. Musgrove*, 43.

§ 15.1. Sufficiency of Evidence

Evidence was sufficient for the jury in a proceeding to determine the boundaries between the parties' land. *Reeves v. Musgrove*, 43.

BURGLARY AND UNLAWFUL BREAKINGS**§ 1.2. What Constitutes "Breaking"**

A person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public. *S. v. Boone*, 218.

COLLEGES AND UNIVERSITIES**§ 1. Government and Control of State Institutions**

A member of the State Banking Commission is an "officer of the State" within the meaning of G.S. 116-7(b) and is prohibited by that statute from also serving on the Board of Governors of the University of North Carolina. *Sansom v. Johnson*, 682.

CONSPIRACY**§ 4.1. Sufficiency of Indictment**

In indictments charging felonious conspiracy to steal a trailer loaded with tobacco from its owner in Virginia, it was not necessary to allege that the larceny of the property was a felony in Virginia. *S. v. Johnston*, 179.

§ 6. Sufficiency of Evidence

State's evidence was sufficient for the jury on the issue of defendant's guilt of conspiracy to murder her mother and sister. *S. v. Rhyne*, 319.

CONSTITUTIONAL LAW**§ 13.1. Regulation of Design, Construction and Safety of Buildings**

The Legislature did not expressly or impliedly grant the State Building Code Council power to amend the State Building Code so as to impose new and more stringent requirements upon existing buildings which complied with the Code and which were neither being altered nor changed in use. *Carolinas-Virginias Assoc. v. Ingram*, 688.

§ 21. Right to Security in Person and Property

The "Inspections" section of the Occupational Safety and Health Act of N.C. violates the IV and XIV Amendments to the U.S. Constitution insofar as it purports to authorize warrantless searches of business premises. *Gooden v. Brooks, Comr. of Labor*, 519.

An administrative inspection warrant issued pursuant to G.S. 15-27.2 does not constitute a general warrant prohibited by the N.C. Constitution. *Brooks, Comr. of Labor v. Enterprises, Inc.*, 529.

CONSTITUTIONAL LAW — Continued

Statutory provisions which permit a magistrate to issue an administrative inspection warrant upon making an independent determination that the target property "is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property" or that there is "probable cause" justifying an administrative inspection of the property are not unconstitutionally void for vagueness. *Ibid.*

§ 24.7. Service of Process on Foreign Corporations and Nonresident Individuals

Sufficient contacts existed between N.C. and a nonresident director of a domestic corporation so as to render constitutional the exercise of long-arm jurisdiction over the nonresident director in a shareholders' derivative action. *Swenson v. Thibaut*, 77.

Allegations based upon plaintiff's personal knowledge and belief were insufficient as a basis for an exercise of jurisdiction over out of state defendant partnership, and the placing of advertisements in national magazines by the partnership, without more, was not sufficient contact with this State to permit an exercise of personal jurisdiction over the partnership. *Hankins v. Somers*, 617.

By conducting a wire art business in N.C., though unrelated to the business activities which plaintiff sought to prohibit, the individual defendants had sufficient contact with the State to permit the exercise of personal jurisdiction over them. *Ibid.*

§ 26.5. Full Faith and Credit; Child Custody or Support

An adjudication of paternity in plaintiff's Nevada divorce action would be entitled to full faith and credit in the courts of this State. *Williams v. Holland*, 141.

§ 28. Equal Protection in Criminal Proceedings

G.S. 14-33(b)(2) providing for sentence of fine and/or up to two years imprisonment for assault by a male over 18 upon a female does not deny males equal protection of law in violation of the XIV Amendment. *S. v. Gurganus*, 395.

§ 31. Affording the Accused the Basic Essentials for Defense

An indigent defendant failed to show the necessity for court appointment of a private investigator. *S. v. Inman*, 366.

§ 44. Right to Counsel; Time to Prepare Defense

Trial court erred in denying defendant's motion for continuance in order to prepare for trial where defense counsel were retained 17 days before the case was called and defendant's counsel moved for continuance on the same day they were retained. *S. v. Moore*, 643.

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel because he had no appointed counsel between the time of a mistrial and his second trial or because he was unable to secure the testimony of a codefendant who had previously been acquitted. *S. v. Hall*, 728.

§ 50. Speedy Trial Generally

Defendant's constitutional right to a speedy trial was not denied by a delay of over 19 months between the time defendant was granted a new trial by the Court of Appeals and his retrial, although the length of the delay and testimony by the clerk of court that a number of more recent cases were calendared ahead of defendant's case showed neglect on the part of the State. *S. v. Lamb*, 334.

CONSTITUTIONAL LAW — Continued**§ 53. Speedy Trial; Delay Caused by Defendant**

Defendant was not denied his right to a speedy trial on an armed robbery charge by a delay between his arrest on 27 October 1976 and his trial in the latter part of April 1978 where the case was postponed at defendant's request on two occasions and because of defendant's illness on another occasion, and the case was not calendared for trial on some occasions to accommodate defendant's attorney. *S. v. Thompson*, 375.

§ 55. Speedy Trial; Waiver

Defendant was not denied his right to a speedy trial by the passage of 15 months from the date of a mistrial until the date of his second trial. *S. v. Hall*, 728.

§ 56. Trial by Jury Generally

The trial of defendant by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases did not contravene the language and objectives of G.S. 15A-943. *S. v. Brown*, 548.

CONTEMPT OF COURT**§ 6.2. Sufficiency of Evidence**

Appellant could be held in contempt for aiding a minor to disobey an order requiring her not to associate with appellant. *In re Campbell*, 251.

CORPORATIONS**§ 6. Right of Stockholders to Maintain Action**

Minority shareholders were not required to make a demand upon the board of directors of a corporation before bringing a derivative action against officers and directors of the corporation where defendants constituted a majority of the board at the time the action was instituted. *Swenson v. Thibaut*, 77.

In a derivative action brought by minority shareholders, the corporation will be deemed to be aligned as a party plaintiff and ordinarily may not defend itself against the derivative action on the merits. *Ibid.*

§ 14. Liability of Officers and Agents to Corporation

In an action against directors of a corporation for malfeasance in office, other parties to the transactions constituting the malfeasance were not necessary parties. *Swenson v. Thibaut*, 77.

In a derivative action brought by shareholders of a corporation against directors for malfeasance in office, trial court properly refused to grant summary judgment for defendant directors on the ground that the action of a majority of the board of directors in declining to sue themselves and in deciding to resist the derivative action claims against them was a good faith business judgment. *Ibid.*

A law firm which represented an insurance company in rehabilitation proceedings was not prohibited from representing plaintiff minority shareholders of the corporation in a derivative action against the corporation's directors by Canon 4 of the Code of Professional Responsibility which prohibits the improper use of confidences of a client. *Ibid.*

The provisions of G.S. 55-30, governing transactions between interested directors and their corporations, did not prohibit a corporation's advancement of legal fees under G.S. 55-19(d) to a director being sued in a derivative action by minority shareholders for malfeasance in office. *Ibid.*

CRIME AGAINST NATURE**§ 3. Evidence and Trial**

In a prosecution for taking indecent liberties with two minor boys, there was no fatal variance between indictment and proof where the indictment alleged the offenses were committed "on or about the 28th day of June 1977" and the testimony showed that the minors did not remember the exact dates of the offenses. *S. v. Guffey*, 359.

CRIMINAL LAW**§ 24. Plea of Not Guilty**

The evidence did not reveal that defendant was given a greater sentence because he did not enter into a plea bargain. *S. v. Bagley*, 328.

§ 34.2. Other Offenses; Admission of Inadmissible Evidence as Harmless Error

In a prosecution for larceny, testimony that a box found in the trunk of defendant's vehicle was a "booster box . . . generally used by professional shoplifters" was a relatively insignificant part of the State's case, and defendant was not injured in light of the other evidence of his guilt. *S. v. Boone*, 218.

§ 34.5. Other Offenses; Admissibility to Show Identity of Defendant

In a prosecution for breaking and entering and larceny, an officer's testimony that he had talked with defendants many times while working in an undercover capacity buying stolen property was admissible to develop evidence with regard to a telephone call the officer received in connection with the crimes charged and to identify defendants as the persons with whom the officer had dealt. *S. v. Burnett*, 605.

§ 34.6. Other Offenses; Admissibility to Show Intent

In a prosecution for possession of heroin with intent to sell, testimony by a witness that she had bought heroin from defendant 75 to 100 times in the past was properly admitted to show intent. *S. v. Bagley*, 328.

§ 42.4. Identification of Object and Connection With Crime; Weapons

A knife was sufficiently connected with the felonious assault charged to permit its admission into evidence. *S. v. Rhyne*, 319.

§ 45. Experimental Evidence

In a prosecution of defendant for murder of his seven month old baby, the court properly permitted a police officer to whom defendant had made a statement to demonstrate the manner in which defendant had shown him he shook the baby without showing substantially similar circumstances. *S. v. Lane*, 33.

§ 48. Silence of Defendant as Implied Admission

Trial court did not err in allowing the district attorney to question defendant concerning his failure to make a statement at the time of his arrest and after he had been warned of his constitutional right to silence. *S. v. McQueen*, 64.

Where a defendant who had not been advised of his Miranda rights waited until he took the witness stand in his defense to reveal the identity of the allegedly true perpetrator of the crimes with which defendant was charged, the prosecutor could cross-examine defendant with regard to his prior silence as to the identity of the alleged perpetrator. *S. v. Burnett*, 605.

CRIMINAL LAW — Continued**§ 53.1. Medical Expert Testimony as to Cause and Circumstances of Death**

In a prosecution of defendant for murder of his seven month old child, trial court did not err in permitting the State to ask its medical expert a hypothetical question designed to elicit an opinion as to whether defendant's shaking of the child could have caused the hemorrhage which resulted in his death without including any reference to evidence that the baby had fallen from a bed earlier the same day. *S. v. Lane*, 33.

§ 60.2. Fingerprint Cards

Defendant's contention that testimony which referred to a fingerprint file on defendant was inadmissible because it amounted to evidence of other distinct or separate offenses committed by defendant is without merit. *S. v. Rudolph*, 293.

§ 60.5. Competency of Fingerprint Evidence

Evidence concerning defendant's palm print found on a stolen cash register was properly admitted. *S. v. Rudolph*, 293.

§ 66.11. Identification of Defendant; Confrontation at Scene of Crime

In-court identification of defendant was based on the witness's observations at the crime scene, and confrontation 2½ hours after the alleged robbery at the crime scene was not suggestive. *S. v. Brown*, 548.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Pretrial Identification Procedures

A robbery victim's in-court identification of defendant and his accomplice was of independent origin and not tainted by a show-up at a hospital. *S. v. McCain*, 213.

§ 71. Shorthand Statement of Fact

Testimony by a State's witness that he found defendant "hiding" in the bushes was competent as a shorthand statement of fact. *S. v. Kelly*, 246.

§ 73.1. Admission of Hearsay Statement as Harmless Error

In a prosecution for unlawful possession of a stolen vehicle, an officer's testimony that he had checked with the police and sheriff's departments and determined that defendant was not an officer of either was incompetent hearsay, but the admission of such testimony was harmless error. *S. v. Murchinson*, 163.

§ 74.3. When Confession Is Competent

Extrajudicial statements made by accomplices implicating defendants were properly admitted for the purpose of corroborating the testimony of the accomplices. *S. v. Johnston*, 179.

§ 75.2. Confession; Effect of Promises, Threats or Other Statements of Officers

The fact that an officer told defendant he had statements from three witnesses that they had seen defendant leaving the scene of a robbery did not render defendant's subsequent in-custody statements involuntary. *S. v. Thompson*, 375.

§ 75.7. Confession; Custodial Interrogation

Defendant's incriminating statements to officers in her home resulted from custodial interrogation rather than from a general on-the-scene investigation, and such statements were inadmissible where defendant did not specifically waive her right to counsel. *S. v. Clay*, 150.

CRIMINAL LAW — Continued**§ 75.15. Defendant's Mental Capacity to Confess or Waive Rights; Intoxication**

The fact that defendant was intoxicated did not negate the court's conclusion that defendant's statements were freely, understandingly and voluntarily made. *S. v. Atkinson*, 575.

§ 76.10. Confession; Review of Trial Court's Determination of Admissibility

Evidence was sufficient to support trial court's conclusion that defendant voluntarily made inculpatory statements to police officers during custodial interrogation. *S. v. Byrd*, 659.

§ 78. Stipulations

A stipulation that defendants had standing to challenge the validity of a search and seizure was improper. *S. v. Prevette*, 470.

§ 79. Acts and Declarations of Companions

Evidence with respect to the conduct of defendant's accomplices was admissible in a prosecution for robbery with a firearm. *S. v. Rudolph*, 293.

§ 81. Best Evidence

Testimony by officers that a breathalyzer test was administered to defendant at 1:05 p.m. when the breathalyzer record indicated that the test was administered at 12:15 p.m. did not violate the best evidence rule. *S. v. Mills*, 47.

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

Trial court in a prosecution for driving under the influence did not err in allowing the State to use defendant's prior motor vehicle convictions for impeachment purposes. *S. v. Atkinson*, 575.

Defendant's prior convictions over the past several years were admissible as tending to show his lack of trustworthiness. *Ibid.*

§ 88.3. Cross-Examination as to Collateral Matters

In a prosecution for solicitation to commit murder in which defendant denied on cross-examination that he had told a witness that he had killed two persons in another county, trial court erred in permitting the witness to testify on rebuttal for impeachment purposes that defendant had told him that he had killed such persons. *S. v. Robinette*, 622.

§ 91. Nature and Time of Trial; Continuance

The trial of defendant by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases did not contravene the language and objectives of G.S. 15A-943. *S. v. Brown*, 548.

§ 91.6. Continuance on Ground That Defendant Needs Additional Time to Obtain Evidence

Trial court erred in denying defendant's motion for continuance in order to prepare for trial where defense counsel were retained 17 days before the case was called and defendant's counsel moved for continuance on the same day they were retained. *S. v. Moore*, 643.

§ 99.1. Court's Expression of Opinion on the Evidence

Trial court expressed an opinion on the evidence when, during a discussion of defendant's motion to quash indictments charging him with taking indecent liber-

CRIMINAL LAW — Continued

ties with two children, he remarked in the presence of prospective jurors, "Well, it's two different—two different people. He was pretty busy that day." *S. v. Guf-fey*, 359.

§ 99.4. Court's Conduct in Connection With Objections and Rulings Thereon

Trial court did not express an opinion on the evidence when he corrected defense counsel in the presence of the jury or when he instructed counsel not to object to the same question again. *S. v. Francum*, 429.

§ 101.2. Exposure of Jury to Evidence Not Formally Introduced

Defendant was not denied a fair trial by the denial of his motion to have an article which was not introduced in evidence removed from the jury view during the trial. *S. v. Mills*, 47.

§ 102.8. Comment by Counsel on Defendant's Failure to Testify

Trial court did not err in refusing to permit defendant's counsel to argue to the jury concerning defendant's failure to testify. *S. v. Boone*, 218.

§ 102.9. Counsel's Comment on Defendant's Character

Characterizations of defendant by the district attorney as a .44 caliber killer, a robber and a thief were not prejudicial to defendant. *S. v. Brown*, 548.

§ 111.1. Miscellaneous Jury Instructions

The trial judge did not violate G.S. 15A-1213 by reading a portion of the indictment to the jury as part of his charge. *S. v. Laughinghouse*, 655.

§ 113.3. Charge on Subordinate Feature of Case; Request for Instruction Required

In a prosecution for driving under the influence, defendant was not entitled, absent a request, to a special instruction informing the jury that they must consider the condition of defendant at the time he made statements in determining the weight and credibility to be given those statements. *S. v. Atkinson*, 575.

§ 113.6. Charge Where There Are Several Defendants

A charge which was susceptible to the construction that the jury should convict both defendants if it found one defendant guilty constituted reversible error. *S. v. Curl*, 73.

Trial court's statements with respect to considering the guilt of each defendant separately were insufficient to cure the court's earlier erroneous instruction that if the jury found that either defendant had committed the acts charged then both would be guilty. *S. v. Patterson*, 243.

§ 117. Charge on Character Evidence and Credibility of Witnesses

Trial court was not required to instruct the jury to consider defendant's character evidence as bearing upon his credibility and as substantive evidence absent a request for such an instruction even though the court charged upon the credibility of witnesses in general. *S. v. Tise*, 495.

§ 119. Requests for Instructions

Trial court did not err in failing to give an instruction on prior inconsistent statements as orally requested by defendant. *S. v. Lamb*, 334.

CRIMINAL LAW — Continued**§ 130. New Trial for Misconduct of Jury**

Trial court properly denied defendant's motion for mistrial because the breathalyzer operator had talked to one juror during a recess where the conversation related only to a softball team. *S. v. Mills*, 47.

§ 131.1. New Trial for Newly Discovered Evidence; Discretion of Trial Court

Defendant failed to show an abuse of discretion in the trial court's denial of his motion for a new trial on the ground of newly discovered evidence consisting of a psychological evaluation of defendant. *S. v. Byrd*, 659.

§ 145. Costs

Where an attorney representing two defendants in an appeal from a consolidated trial caused two separate records on appeal to be filed, the attorney will be taxed with the costs of the unnecessary record. *S. v. Inscoe*, 326.

§ 162.4. Objection to Answer; Motion to Strike

Though it was incorrect for the trial judge to deny defendant's motion to strike merely because defendant did not object to the question, defendant was not prejudiced by the admission of the evidence. *S. v. Bagley*, 328.

§ 163. Exceptions and Assignments of Error to Charge

Defendant could not, for the first time, seek collateral review of alleged errors in the trial court's charge that took place during his trial when he failed to raise the question at trial, on direct appeal, or in a subsequent petition for post-conviction relief. *S. v. Locklear*, 671.

DAMAGES**§ 17. Instructions**

Trial court's instruction that the jury could award any sum from \$1.00 to \$20,000.00 did not leave the damages in the unbridled discretion of the jury. *Tennessee v. Cogburn*, 627.

DECLARATORY JUDGMENT ACT**§ 3. Requirement of Actual Justiciable Controversy**

Trial court did not err in dismissing plaintiff's complaint for declaratory judgment which prayed the court to declare the Yadkin River Basin a capacity use area since plaintiffs failed to exhaust administrative remedies. *High Rock Lake Assoc. v. Environmental Management Comm.*, 699.

§ 4.7. Validity and Construction of Testamentary Trusts

There was no justiciable controversy where plaintiffs sought to have the provisions of the Internal Revenue Code interpreted by the trial court so as to create a controversy between the parties. *Griffin v. Fraser*, 582.

DEEDS**§ 12.1. Fee Simple Estates**

A clause in the introductory recital of a deed executed in 1933 purporting to limit the title of the grantee to a life estate was of no effect where the granting clause, habendum and warranty gave the grantee an unqualified fee. *Gamble v. Williams*, 630.

DIVORCE AND ALIMONY**§ 18.3. Alimony Pendente Lite; Pleadings**

In an action for permanent alimony, alimony pendente lite, and custody and support of children, trial court did not err in granting plaintiff's motion to amend the complaint to include a demand for attorney's fees. *Rogers v. Rogers*, 635.

§ 18.16. Alimony Pendente Lite; Attorney's Fees

Allegations by plaintiff that she was the dependent spouse and that she had insufficient means to support her children during the pendency of the suit were sufficient to support an award of counsel fees to plaintiff, but the trial court erred in failing to make findings as to plaintiff's ability to defray the expenses of the suit and findings as to the reasonableness of the attorney's fees incurred. *Rogers v. Rogers*, 635.

§ 23. Child Support; Jurisdiction

In an action to recover arrearages for child support which had been ordered by a Nevada court in a divorce action instituted by plaintiff, defendant was barred by res judicata from raising the issue of paternity. *Williams v. Holland*, 141.

§ 23.1. Child Custody; Jurisdiction in Connection With Action for Alimony Without Divorce

Where the wife filed a complaint in one county seeking alimony without divorce and child custody, the court in another county was without jurisdiction to entertain the husband's subsequent action for child custody. *Benson v. Benson*, 254.

§ 24. Child Support Generally

Defendant in a child support action was estopped to deny paternity of the child by his legitimation of the child pursuant to G.S. 49-12 and 49-13 after his marriage to the child's mother. *Myers v. Myers*, 201.

In an action for alimony and child support, trial court did not err in awarding possession of the marital home owned by the parties as tenants by the entirety as part of the support. *Rogers v. Rogers*, 635.

§ 26.1. Modification of Foreign Order; Full Faith and Credit

A Florida decree awarding custody of a child to defendant mother was not entitled to full faith and credit. *McAninch v. McAninch*, 665.

ELECTIONS**§ 15. Campaign Contributions**

An insurance company's contribution of money for an appreciation breakfast for John Ingram after his reelection as Commissioner of Insurance did not violate criminal statutes prohibiting the payment of money by insurance companies for or in aid of any political organizations or candidates or for any political purposes whatsoever. *State v. Ins. Co.*, 557.

ELECTRICITY**§ 7.1. Fire on Consumer's Premises; Sufficiency of Evidence of Defendant's Negligence**

Plaintiffs' evidence was insufficient to support a jury finding that a fire at plaintiffs' barn was caused by defendant power company's line which ran to the barn, and the doctrine of res ipsa loquitur was inapplicable. *Snow v. Power Co.*, 350.

ESTOPPEL

§ 4.2. Equitable Estoppel; Conduct of Party Sought to Be Estopped; Silence

In an action for legal malpractice in failing to file a suit on behalf of plaintiff until after it was barred by the statute of limitations, there was a genuine issue of material fact for determination as to whether defendant attorney was barred from asserting a defense of the statute of limitations by the doctrine of equitable estoppel. *Stereo Center v. Hodson*, 591.

EVIDENCE

§ 22. Evidence at Former Trial

Trial court correctly excluded a transcript of testimony given at a prior trial since at the first trial the testimony was placed in the record after defendants' objection was sustained, and defendants therefore did not have a reasonable opportunity to cross-examine the witness at the prior trial. *Bullock v. Insurance Co.*, 386.

§ 44. Nonexpert Opinion Evidence; Physical Condition

Trial court properly excluded testimony by plaintiff as to the cause of his physical illness since plaintiff was not a medical expert and no qualified medical expert was offered to testify to the causation. *Ross v. Yelton*, 677.

§ 51. Expert Testimony; Blood Tests

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. *Williams v. Holland*, 41.

EXECUTORS AND ADMINISTRATORS

§ 30. Taxes

Assets of a holding corporation which were in the hands of a receiver by virtue of a consent judgment could be used by the administrator to pay part of the estate taxes of decedent. *In re McCoy*, 52.

FIDUCIARIES

§ 1. Generally

Summary judgment was improper for defendant bank in an action by a receiver of a corporation to recover assets for the benefit of creditors where the receiver alleged that defendant bank permitted the misapplication of funds by a fiduciary. *Edwards v. Bank*, 261.

§ 2. Evidence of Fiduciary Relationship

Evidence was insufficient to impose a fiduciary obligation on defendant bank which financed affairs of a corporation. *Edwards v. Bank*, 261.

FIRES

§ 3. Evidence

Plaintiffs' evidence was insufficient to support a jury finding that a fire at plaintiffs' barn was caused by defendant power company's line which ran to the barn, and the doctrine of *res ipsa loquitur* was inapplicable. *Snow v. Power Co.*, 350.

FRAUD**§ 12. Sufficiency of Evidence**

Plaintiff's evidence was sufficient for the jury on the issue of fraud by defendants in the sale of a motel and cafeteria by misrepresenting the profits for the motel and cafeteria. *Woodward v. Pressley*, 61.

FRAUDULENT CONVEYANCES**§ 3.4. Sufficiency of Evidence**

Assignment of a note and deed of trust from a corporation to defendant bank which agreed to forego its rights under a security agreement covering the corporation's inventory did not constitute a fraudulent conveyance. *Edwards v. Bank*, 261.

GAS**§ 1. Regulation**

Charges incurred for increased storage capacity and paid to the natural gas wholesaler are not part of the wholesale cost of natural gas within the meaning of G.S. 62-133(f), and the increased cost cannot be reflected in the retail rates automatically. *Utilities Comm. v. Industries, Inc.*, 477.

GUARANTY**§ 1. Generally**

Summary judgment was properly entered for plaintiff mortgage company on the individual defendants' claim for reformation of an agreement in which they guaranteed the debts and obligations of the corporate defendants "now existing or hereafter arising" on the ground that the parties had agreed that the guaranty would be prospective only. *Mortgage Co. v. Real Estate, Inc.*, 1.

HOMICIDE**§ 15.5. Opinion as to Cause of Death**

Experienced police officers could properly testify in an involuntary manslaughter prosecution that the deceased died from drowning. *S. v. Trueblood*, 459.

§ 21.1. Sufficiency of Evidence Generally

State's evidence was sufficient for the jury in a prosecution for solicitation to commit murder. *S. v. Robinette*, 622.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence was sufficient for the jury in a first degree murder case where it tended to show that defendant stabbed deceased in the common area of an apartment complex. *S. v. Smith*, 11.

§ 21.9. Sufficiency of Evidence of Manslaughter

Evidence was sufficient for the jury in a prosecution for involuntary manslaughter where it tended to show that defendant pushed deceased into a pond. *S. v. Trueblood*, 459.

§ 24.1. Instructions on Presumptions Arising From Use of Deadly Weapon

Trial court properly instructed on the presumptions arising from the use of a deadly weapon. *S. v. Smith*, 11.

HOMICIDE — Continued**§ 24.2. Instructions on Defendant's Burden of Meeting or Overcoming Presumption of Malice**

Defendant could not, for the first time, seek collateral review of alleged errors in the trial court's charge that took place during his trial when he failed to raise the question at trial, on direct appeal, or in a subsequent petition for post-conviction relief. *S. v. Locklear*, 671.

§ 27.2. Instruction on Involuntary Manslaughter

In a prosecution for second degree murder, trial court's instruction on involuntary manslaughter that "the defendant's act was unlawful in the use of a deadly weapon" tended to take from the jury the opportunity to decide whether defendant's pointing of the gun was justified and thus negated self-defense. *S. v. Spinks*, 340.

§ 28.2. Instructions on Self-Defense; Existence of Necessity to Take Life

Trial court's instruction with respect to self-defense that the jury should determine the reasonableness of defendant's belief that he was about to suffer death or serious harm was proper. *S. v. Smith*, 11.

§ 28.4. Instructions on Self-Defense; Duty to Retreat

In a prosecution for first degree murder which occurred in the common area for all apartments in a complex, defendant was not entitled to an instruction concerning one's right to defend himself in his own home or the home of his host. *S. v. Smith*, 11.

§ 30.3. Instructions on Lesser Degrees of Crime; Involuntary Manslaughter

Though decedent's daughter testified in a first degree murder prosecution that defendant told her that he had stabbed decedent but that he didn't mean to, trial court did not err in failing to submit to the jury the lesser included offense of involuntary manslaughter. *S. v. Smith*, 11.

INDICTMENT AND WARRANT**§ 17.5. Variance; Miscellaneous Allegations**

In a felonious assault case in which the indictment alleged that a lamp was the deadly weapon used and the evidence showed defendant used both a lamp and porcelain figurines, defendant was not prejudiced by the court's charge which permitted the jury to find that a porcelain figurine was the deadly weapon used in the assault. *S. v. Ryne*, 319.

INFANTS**§ 20. Judgments and Orders**

Trial court erred in committing respondent to a training school without first finding that respondent would not adjust in her home, albeit a foster one, on probation or while other services were furnished. *In re Hardy*, 610.

INSANE PERSONS**§ 1. Commitment to Hospitals**

An affidavit stating that respondent "is believed to have been on drugs for a number of years," that he "is so mixed up," and that he "is now at a place where he

INSANE PERSONS — Continued

is dangerous to himself" was insufficient to establish reasonable grounds for the issuance of a custody order. *In re Reed*, 227.

INSURANCE**§ 67.2. Accident Insurance; Sufficiency of Evidence**

In an action to recover under a policy providing coverage for death by "accidental means," plaintiff's evidence was sufficient for the jury where it was not wholly inconsistent with a finding that, although insured intentionally aimed the gun at his own head, the gun accidentally triggered through a mischance, slip or mishap. *Linder v. Insurance Co.*, 486.

§ 115. Fire Insurance; Insurable Interest

There was a triable issue as to whether plaintiff was manager of the insured property which he owned with two other persons, and trial court erred in granting insurer's motion for summary judgment limiting plaintiff's recovery to one-third of the damage to the property. *Collins v. Insurance Co.*, 38.

§ 126. Fire Insurance; Conditions as to Sole Ownership

Where insurer refused to pay more than one-third of the amount of loss on the insured property because plaintiff owned the property with two other persons as tenants in common, there was no triable issue as to whether insurer had notice of the ownership of the property and thereby waived limitation of coverage to the amount of plaintiff's interest. *Collins v. Insurance Co.*, 38.

§ 147.1. Aviation Liability Insurance

In an action to recover on an insurance policy on an airplane, trial court erred in allowing the jury to consider evidence that the owner of a replacement plane had purchased insurance covering the plane which crashed in determining whether testator's employer had an insurable interest in the plane which was being repaired, since there was no logical nexus between the two facts. *Bullock v. Insurance Co.*, 386.

JOINT VENTURES**§ 1. Generally**

Defendant bank was entitled to summary judgment on plaintiff's claim that defendant became a joint venturer in the liquidation of the assets of a corporation and thereafter breached its fiduciary responsibility as such joint venturer. *Edwards v. Bank*, 261.

JUDGES**§ 5. Disqualification**

Trial court did not err in denying defendant's motion that he recuse himself on the ground that he had presided over an earlier trial in which defendant was convicted of breaking or entering. *S. v. Inman*, 326.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

Defendant could properly be convicted of kidnapping and armed robbery where he moved the victim from a convenience store to a hallway in the rear of the building and tied her to a grocery cart. *S. v. Vert*, 26.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement

The acceptance of a note secured by a deed of trust maturing beyond the period for perfecting a materialmen's lien constitutes a waiver of that lien. *Miller v. Lemon Tree Inn*, 133.

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

Trial court properly dismissed a claim for repossession for nonpayment of rent where defendant tendered all rent due and all costs by depositing the money with the clerk of court. *Green v. Lybrand*, 56.

An action to recover possession of demised premises upon a forfeiture for nonpayment of rent was not an action "for the collection of any monies due" under the lease within the meaning of a lease provision relating to the recovery of attorney fees. *Ibid.*

§ 19. Rent and Actions Therefor

Written notice of nonpayment of rent as required by the lease was not a condition precedent to an action by the landlord for rent based on the tenant's abandonment of the leased premises. *Shopping Center v. Glenn*, 67.

In an action for rent against a lessee who abandoned the leased premises, trial court properly subtracted from the award of damages the actual rent collected by the lessor from another tenant rather than the reasonable rental value of the premises. *Ibid.*

LARCENY

§ 4. Warrant and Indictment

In indictments charging felonious conspiracy to steal a trailer loaded with tobacco from its owner in Virginia, it was not necessary to allege that the larceny of the property was a felony in Virginia. *S. v. Johnston*, 179.

§ 4.1. Indictment; Description of Property Taken

Indictments charging defendants with felonious larceny of tires contained a sufficient description of the property taken. *S. v. Hartley*, 70.

§ 4.2. Indictment; Ownership of Property Taken

There was no variance between the indictment charging larceny of tires from a partnership and proof the tires were taken from a business which was incorporated at the time of trial. *S. v. Hartley*, 70.

There was no fatal variance between the indictments which charged that the property taken belonged to Lees-McRae College and the proof that the property actually belonged to a vending company and a food services company but was in the possession of the college. *S. v. Liddell*, 373.

LARCENY — Continued**§ 6.1. Evidence of Value of Property Taken**

Trial court in a larceny case properly allowed a sales clerk to present an opinion as to the fair market value of stolen merchandise. *S. v. Boone*, 218.

LIBEL AND SLANDER**§ 12.1. Limitation of Actions**

Plaintiff's action for libel based on a report placed in his personnel file in October 1972 was barred by the statute of limitations. *Pressley v. Can Company*, 467.

§ 14.3. Pleadings as to Privilege

Plaintiff's allegations that defendant school principal made defamatory remarks about her which caused her discharge and that the actions of the principal were taken in bad faith and maliciously were sufficient to overcome defendant's motion to dismiss based upon qualified privilege. *Presnell v. Pell*, 538.

LIMITATION OF ACTIONS**§ 4. Accrual of Right of Action**

Plaintiff's claim for the wrongful conversion of its security interest in certain property subsequent to 9 September 1974 was not barred by the statute of limitations when it was instituted on 7 September 1977. *F.D.I.C. v. Loft Apartments*, 473.

§ 4.2. Accrual of Negligence Action

The statute of limitations for an action for legal malpractice in failing to file a suit until after it was barred by the statute of limitations began on the last date on which defendant attorney could have successfully filed the prior suit for plaintiff. *Stereo Center v. Hodson*, 591.

§ 4.6. Accrual of Contract Action

Plaintiff's claim for damages for breach of the terms of his employment contract which occurred prior to his dismissal was barred by the statute of limitations, but his claim for damages resulting from the termination of his employment contract was not barred. *Burkheimer v. Gealy*, 450.

§ 8.2. Fraud as Exception to Operation of Limitation Law; Sufficiency of Notice of Facts Constituting Alleged Fraud

The mere registration of a deed allegedly made to defraud creditors is insufficient to start the running of the statute of limitations on a claim to set aside the deed. *Cowart v. Whitley*, 662.

Evidence presented a jury question as to whether plaintiff should have discovered alleged fraud more than three years prior to the time the suit was instituted. *Ibid.*

MASTER AND SERVANT**§ 1. Employment Relationship in General**

Plaintiff's complaint alleging that he was denied employment because he has simple glaucoma stated a cause of action to enforce rights under G.S. Chapter 168. *Burgess v. Brewing Co.*, 481.

§ 10. Duration of Employment Contract

Plaintiff's employment contract was a continuing one terminable at the will of either party. *Burkheimer v. Gealy*, 450.

MASTER AND SERVANT — Continued**§ 10.2. Actions for Wrongful Discharge**

Plaintiff's allegation that she was discharged from employment because of false accusations against her and that defendant conveyed the reason for her discharge to her fellow employees alleged a deprivation of her liberty by defendant, and plaintiff's additional allegation that she was deprived of her liberty in this manner without a prior hearing formed the basis for a justiciable claim for deprivation of liberty without due process. *Presnell v. Pell*, 538.

§ 49.1. Employees Within Meaning of Workmen's Compensation Act

The Industrial Commission erred in determining that plaintiff who operated a farming partnership with his son was not an employee and that the Commission did not have jurisdiction over his workmen's compensation claim since the insurer treated plaintiff as an employee and collected a premium based on his salary. *Garrett v. Garrett & Garrett Farms*, 210.

§ 108. Right to Unemployment Compensation

Appellee's termination of his studies at the University of N.C. and subsequently his research assistantship did not constitute a voluntary abandonment of work within the meaning of G.S. 96-14(1) so that appellee was disqualified for unemployment benefits. *In re Scaringelli*, 648.

MORTGAGES AND DEEDS OF TRUST**§ 9. Release of Part of Land From Mortgage Lien**

In an action to recover a deficiency judgment, trial court properly granted summary judgment for plaintiff on defendants' defense that plaintiff had released property as security for the loans without defendants' knowledge or consent. *Mortgage Co. v. Real Estate, Inc.*, 1.

§ 25. Foreclosure by Exercise of Power of Sale in Instrument

In an action to enjoin foreclosure where plaintiffs alleged that they were not in default and that a portion of the property sought to be foreclosed had been released from the deed of trust by the lender, trial court erred in denying a preliminary injunction and finding that the matters complained of should be raised before the Clerk of Superior Court. *Golf Vistas v. Mortgage Investors*, 230.

§ 32. Deficiency and Personal Liability

In an action to recover deficiencies remaining after the foreclosure sale of property securing land and condominium construction loans, the trial court properly entered summary judgment for plaintiff mortgage company on defendants' claim that plaintiff breached an agreement to provide permanent loans at competitive interest rates for purchasers of the condominiums. *Mortgage Co. v. Real Estate, Inc.*, 1.

§ 40. Grounds for Setting Aside Sale or Conveyance

Where a federal bankruptcy court had enjoined a trustee from delivering a deed pursuant to a foreclosure sale of plaintiffs' property, and plaintiffs were represented by counsel at a hearing on whether the restraining order should be dissolved, there was no requirement that plaintiffs be notified that the order had been entered dissolving the restraining order in order for the trustee's subsequent delivery of the deed to be valid. *Martin v. Liles*, 498.

MUNICIPAL CORPORATIONS**§ 4.5. Housing and Urban Development**

A cooperation agreement entered into by the City of Durham and the Durham Redevelopment Commission whereby the city obligated itself to provide funding for one-third of the cost of the urban renewal plan did not pledge the faith and credit of the city in violation of Art. VII, § 6 of the N.C. Constitution. *Campbell v. Church*, 117.

§ 22.3. Contracts for Sale of Property

The exchange of property between a redevelopment commission and a redeveloper, such as the church in this case, was nothing more than a private sale of real property to a nonprofit association or corporation, and such exchange was not made in compliance with G.S. 160-464(e)(4). *Campbell v. Church*, 117.

§ 31. Judicial Review of Zoning Ordinance

Defendant who had allegedly violated a city zoning ordinance could not attack a proceeding before the Board of Adjustment as a defense to the city's action for injunctive relief. *City of Hickory v. Machinery Co.*, 236.

NARCOTICS

§ 1.1. Activities Regulated or Prohibited

The N.C. Toxic Vapors Act, which prohibits the intentional inhalation of toxic vapors for the purpose of causing certain conditions, is constitutional. *S. v. Futrell*, 674.

§ 4. Sufficiency of Evidence

There was sufficient evidence of quantity to justify submission to the jury of a charge of possession of LSD with intent to sell. *S. v. Francum*, 429.

NEGLIGENCE

§ 5.1. Dangerous Instrumentalities

Evidence was sufficient for the jury to find that a mini bike was a dangerous instrumentality and that defendant father was negligent in entrusting such dangerous instrumentality to his minor son. *Honea v. Bradford*, 652.

§ 31. Effect of Res Ipsa Loquitur on Sufficiency of Evidence

The doctrine of res ipsa loquitur was inapplicable in an action against a power company to recover for damages to plaintiffs' barn allegedly caused by a power line leading to the barn. *Snow v. Power Co.*, 350.

§ 35.2. Contributory Negligence Not Shown as Matter of Law

Plaintiff's evidence did not disclose that it was contributorily negligent as a matter of law in the manner in which it loaded knitting machines into a trailer being towed by defendant. *Fabrics, Inc. v. Delivery Service*, 443.

§ 48. Condition and Maintenance of Entryway to Premises

Trial court improperly entered summary judgment for defendants in an action to recover for injuries sustained by plaintiff when she slipped and fell on a wet floor in a shopping mall. *Gladstein v. South Square Assoc.*, 171.

PARENT AND CHILD

§ 1.2. Competency of Evidence on Question of Legitimacy

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. *Williams v. Holland*, 141.

§ 2.1. Liability of Parent for Injury to Child

The statute abrogating the doctrine of parent-child immunity in an action by a minor child against a parent for injury arising out of the operation of a motor vehicle is constitutional. *Ledwell v. Berry*, 224.

§ 8. Liability of Parent for Torts of Child

Evidence was sufficient for the jury to find that a mini bike was a dangerous instrumentality and that defendant father was negligent in entrusting such dangerous instrumentality to his minor son. *Honea v. Bradford*, 652.

PARTIES

§ 1.2. Necessary Parties

In an action against directors of a corporation for malfeasance in office, other parties to the transactions constituting the malfeasance were not necessary parties. *Swenson v. Thibaut*, 77.

§ 3.1. Joinder of Parties Defendant

The "widow and sole heir at law" of the deceased defendant was properly made a party to an action for specific performance of a contract to sell land. *Deutsch v. Fisher*, 304.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 12. Liability of Anesthetist

The affidavit of an anesthesiologist presented by plaintiff was sufficient to raise issues of fact as to negligence by an anesthesiologist, a nurse anesthetist and a surgeon in an action to recover for the death of plaintiff's wife resulting from massive brain damage sustained when she suffered cardiac arrest during a laminectomy. *Bentley v. Langley*, 20.

§ 17.4. Negligence in Dental Work

Evidence of defendant's negligence in making an incision on the wrong side of plaintiff's mouth was sufficient to be submitted to the jury. *Cozart v. Chapin*, 503.

PLEADINGS

§ 34. Amendment as to Parties

Trial court properly permitted the substitution of administrators for the deceased parties by supplemental pleadings. *Deutsch v. Fisher*, 304.

PROCESS

§ 9. Personal Service on Nonresident Individuals in Another State

Sufficient contacts existed between N.C. and a nonresident director of a domestic corporation so as to render constitutional the exercise of long-arm jurisdiction over the nonresident director in a shareholders' derivative action. *Swenson v. Thibaut*, 77.

PROCESS — Continued**§ 9.1. Minimum Contacts Test**

Allegations based upon plaintiff's personal knowledge and belief were insufficient as a basis for an exercise of jurisdiction over out of state defendant partnership, and the placing of advertisements in national magazines by the partnership, without more, was not sufficient contact with this State to permit an exercise of personal jurisdiction over the partnership. *Hankins v. Somers*, 617.

By conducting a wire art business in N.C., though unrelated to the business activities which plaintiff sought to prohibit, the individual defendants had sufficient contacts with the State to permit the exercise of personal jurisdiction over them. *Ibid.*

§ 12. Service on Domestic Corporations

A summons was not fatally defective because it was directed to an officer of the corporate defendant rather than to the corporation itself. *Smith v. Express Co.*, 249.

PROPERTY**§ 4. Malicious Destruction of Property**

State's evidence was insufficient for the jury in a prosecution for unlawful burning of personal property where it showed only the willful burning of an automobile by defendant but failed to show any intent by defendant to injure or prejudice the owner of the automobile. *S. v. Murchinson*, 163.

PUBLIC OFFICERS**§ 5. Prohibition Against Holding More Than One Public Office**

A member of the State Banking Commission is an "officer of the State" within the meaning of G.S. 116-7(b) and is prohibited by that statute from also serving on the Board of Governors of the University of North Carolina. *Sansom v. Johnson*, 682.

RAILROADS**§ 5.7. Sufficiency of Evidence of Railroad's Negligence**

Trial court erred in entering summary judgment for defendant railroad in an action to recover for the deaths of two occupants of an automobile struck by defendant's train at a grade crossing. *Camby v. Railway Co.*, 455.

RAPE**§ 6.1. Instructions on Lesser Degrees of the Crime**

In a second degree rape case where all the evidence of defendant showed there was a completed act of intercourse, any error in the trial court's charge on assault on a female was not prejudicial to defendant. *S. v. Hamilton*, 687.

§ 19. Taking Indecent Liberties with Child

In a prosecution for taking indecent liberties with a child, the trial court did not err in failing to define "lewd or lascivious act" in its charge to the jury. *S. v. Stell*, 75.

RAPE — Continued

Evidence that a driver education instructor had intercourse with a 15 year old student was sufficient for the jury in a prosecution for taking indecent liberties with a child. *Ibid.*

In a prosecution for taking indecent liberties with two minor boys, there was no fatal variance between indictment and proof where the indictment alleged the offenses were committed "on or about the 28th day of June 1977" and the testimony showed that the minors did not remember the exact dates of the offenses. *S. v. Guffey*, 359.

RECEIVING STOLEN GOODS**§ 1. Elements of Offense**

On a charge of possession of stolen property, it is not necessary for the State to prove someone other than the defendant stole the property. *S. v. Kelly*, 246.

§ 2. Indictment

In indictments charging felonious receiving of stolen tobacco, it was not necessary to allege that the larceny of the property was a felony in Virginia where the theft occurred. *S. v. Johnston*, 179.

§ 5.1. Evidence Sufficient

Evidence was sufficient to support an inference by the jury that the goods stolen were stolen by someone other than the defendant. *S. v. Haywood*, 639.

§ 5.2. Evidence Insufficient

State's evidence was insufficient to show that the goods were stolen by someone other than defendant. *S. v. Prince*, 685.

§ 6. Instructions

Trial judge sufficiently instructed the jury on the intent necessary to support a conviction of feloniously receiving stolen goods although he failed to use the words "felonious intent." *S. v. Laughinghouse*, 655.

REFERENCE**§ 8.2. Rejection of Report by Court**

Where a referee's report was rejected by the court as insufficient, the court was not required to order a further reference. *Reeves v. Musgrove*, 43.

REFORMATION OF INSTRUMENTS**§ 7. Sufficiency of Evidence**

Summary judgment was properly entered for plaintiff mortgage company on the individual defendants' claim for reformation of an agreement in which they guaranteed the debts and obligations of the corporate defendants "now existing or hereafter arising" on the ground that the parties had agreed that the guaranty would be prospective only. *Mortgage Co. v. Real Estate, Inc.*, 1.

ROBBERY**§ 5.1. Instructions on Felonious Intent**

Trial court's error in stating that the jury must find that defendant took away "the property of another with consent of the owner" was not prejudicial to defendant. *S. v. Rudolph*, 293.

§ 5.4. Instructions on Common Law Robbery

Trial court in an armed robbery case erred in failing to charge the jury on common law robbery where some uncertainty was expressed by the State's witnesses as to whether both of the guns used in the robbery were real. *S. v. Thompson*, 375.

§ 6.1. Sentence

G.S. 14-87(c) providing that a person convicted of a violation of G.S. 14-87(a) must serve the first seven years of his sentence without parole, probation, etc. is constitutional. *S. v. Vert*, 26.

RULES OF CIVIL PROCEDURE**§ 4. Process**

A summons was not fatally defective because it was directed to an officer of the corporate defendant rather than to the corporation itself. *Smith v. Express Co.*, 249.

§ 5. Service of Pleadings and Other Papers

Service of a motion to set aside a verdict was not required. *Hennessee v. Cogburn*, 627.

§ 11. Verification of Pleadings

No lack of credibility is implied by the absence of a verification of pleadings. *Hankins v. Somers*, 617.

§ 12. Defenses and Objections

The Court of Appeals converted defendants' Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment by considering on appeal the facts asserted in plaintiffs' brief in addition to the allegations of the complaint. *Fowler v. Williamson*, 715.

By filing motions to disqualify plaintiffs' attorneys, defendants made a general appearance and waived their defense of lack of jurisdiction over the person. *Swenson v. Thibaut*, 77.

§ 15. Amended Pleadings

Trial court erred in denying plaintiff's motion to amend her complaint made on the day the court signed a summary judgment order. *Gladstein v. South Square Assoc.*, 171.

§ 25. Substitution of Parties Upon Death

Trial court properly permitted the substitution of administrators for the deceased parties by supplemental pleadings. *Deutsch v. Fisher*, 304.

§ 26. Depositions

In the absence of a finding that the deponent was dead, the trial court did not err in excluding portions of the deposition in question. *Bullock v. Insurance Co.*, 386.

RULES OF CIVIL PROCEDURE — Continued**§ 37. Consequences of Failure to Make Discovery**

Trial court properly imposed sanctions for plaintiff's failure to comply with an order compelling discovery. *Telegraph Co. v. Griffin*, 721.

§ 52. Findings by Court

Where defendants agreed to disregard Rule 52(a)(1) at the trial level by stipulating that the court's answers to issues would constitute findings of fact and conclusions of law by the court, they could not change their minds on appeal. *Sanders v. Walker*, 355.

Though the trial court erred in failing to make findings of fact in support of its conclusions that an officer arrested plaintiff "upon reasonable grounds," such error was not reversible. *Poag v. Powell, Comr. of Motor Vehicles*, 363.

§ 56.4. Summary Judgment; Opposing Materials

A party opposing a motion for summary judgment will not be allowed to create an issue of fact by filing an affidavit contradicting his prior sworn testimony in a deposition. *Mortgage Co. v. Real Estate, Inc.*, 1.

A physician's affidavit presented in opposition to a motion for summary judgment set forth sufficient facts upon which the affiant's opinion was based. *Bentley v. Langley*, 20.

§ 59. New Trials

It was within the trial court's discretion to set aside a verdict where the motion to set aside was made within 10 days of the entry of the verdict, and the trial court did not lose this discretionary power when the term of court ended. *Tennessee v. Cogburn*, 627.

SCHOOLS**§ 13. Actions Against Principals**

Plaintiffs' brief which stated that their son wore brushed denim pants to a high school graduation ceremony negated their allegation that defendant principal wrongfully claimed that their son did not comply with the applicable dress code. *Fowler v. Williamson*, 715.

§ 13.2. Dismissal of Teachers and Employees

A school board's policy as to corporal punishment did not conflict with the statute conferring on teachers the power to use reasonable force to maintain order in classrooms and prohibiting school boards from adopting policies which interfere with this right, and the evidence was sufficient to support the court's determination that a probationary teacher violated the board's policy in punishing students by striking them about the head or grasping them so firmly about the arm as to leave a bruise. *Kurtz v. Board of Education*, 412.

A teacher's constitutional rights were not violated by the statutory requirement that a teacher dismissal hearing be private. *Ibid*.

Plaintiff's allegation that she was discharged from employment because of false accusations against her and that defendant conveyed the reason for her discharge to her fellow employees alleged a deprivation of her liberty by defendant, and plaintiff's additional allegation that she was deprived of her liberty in this manner without a prior hearing formed the basis for a justiciable claim for deprivation of liberty without due process. *Presnell v. Pell*, 538.

SEARCHES AND SEIZURES

§ 1. Scope of Protection Against Unreasonable Search and Seizure

The "Inspections" section of the Occupational Safety and Health Act of N.C. violates the IV and XIV Amendments to the U.S. Constitution insofar as it purports to authorize warrantless searches of business premises. *Gooden v. Brooks, Comr. of Labor*, 519.

An administrative inspection warrant issued pursuant to G.S. 15-27.2 does not constitute a general warrant prohibited by the N.C. Constitution. *Brooks, Comr. of Labor v. Enterprises, Inc.*, 529.

§ 11. Search of Vehicles on Probable Cause

An inventory of the contents of defendant's car after his arrest pursuant to an outstanding warrant for a traffic violation, during which cocaine was discovered in the locked glove compartment, did not constitute an unreasonable search. *S. v. Phifer*, 278.

Evidence discovered in a search of a car and the person of defendant incident to a warrantless arrest was admissible in a prosecution for robbery with a firearm. *S. v. Rudolph*, 293.

A highway patrolman's inspection of the contents of a paper bag in a wrecked car for the purpose of securing the owner's property prior to having the car towed away did not constitute an unreasonable search and seizure. *S. v. Francum*, 429.

§ 15. Standing to Challenge Lawfulness of Search

A stipulation that defendants had standing to challenge the validity of a search and seizure was improper. *S. v. Prevette*, 470.

Only the plaintiff who had been cited and fined for refusal to permit an inspection of work areas pursuant to G.S. 95-136(a) without a search warrant had standing to enjoin inspection pursuant to that statute. *Gooden v. Brooks, Comr. of Labor*, 519.

§ 19. Validity of Warrant in General

Although a warrant authorizing an OSHA inspection of business premises did not itself specifically indicate the objects of the inspection, it sufficiently complied with statutory provisions where the supporting affidavits set out in great detail various objects and conditions that the inspection was intended to check or reveal. *Brooks, Comr. of Labor v. Enterprises, Inc.*, 529.

§ 22. Showing of Probable Cause for Warrant

Statutory provisions which permit a magistrate to issue an administrative inspection warrant upon making an independent determination that the target property "is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property" or that there is "probable cause" justifying an administrative inspection of the property are not unconstitutionally void for vagueness. *Brooks, Comr. of Labor v. Enterprises, Inc.*, 529.

The provision of G.S. 15-27.2(c)(1) permitting the issuance of an administrative inspection warrant upon a showing that the property was to be inspected "as a part of a legally authorized program of inspection which naturally includes that property" is constitutional when the statute is interpreted as also requiring a showing that the general administrative plan for enforcement is based upon reasonable legislative or administrative standards and is being applied on a neutral basis to the particular establishment to be inspected. *Gooden v. Brooks, Comr. of Labor*, 519.

An affidavit was insufficient to support issuance of an administrative inspection warrant. *Ibid.*

SEARCHES AND SEIZURES — Continued**§ 23. Evidence Sufficient to Show Probable Cause**

Information contained in an application for a search warrant was sufficient to justify a finding of probable cause by the magistrate and his issuance of a search warrant. *S. v. Stinson*, 313.

A warrant authorizing an OSHA inspection of business premises and the supporting affidavits were sufficient to meet minimal standards under the "program of inspection" test set out in G.S. 15-27.2(c)(1). *Brooks, Comr. of Labor v. Enterprises, Inc.*, 529.

§ 34. Plain View Rule; Search of Vehicle

A highway patrolman's inspection of items contained in a paper bag which either fell or was taken by the officer from defendant's wrecked car constituted a search, and the plain view doctrine was inapplicable to the seizure of the items. *S. v. Francum*, 429.

SOCIAL SECURITY AND PUBLIC WELFARE**§ 1. Generally**

Trial court could conduct a de novo hearing on plaintiff's appeal from defendant's denial of her petition for special assistance for an aged adult. *Blackwell v. Dept. of Social Services*, 437.

In an action to obtain special assistance for an aged adult, evidence was sufficient to support trial court's finding that all but \$3000 of plaintiff's assets had been distributed to her children in cash, and the court properly remanded the case for further determination as to whether the \$3000 should be included in plaintiff's reserve level and whether plaintiff "otherwise meets all the criteria of eligibility for Special Assistance to Aged Adults." *Ibid.*

SOLICITORS**§ 1. Generally**

Defendant's contention that his prosecution under the district attorney's career criminal program was a denial of due process and equal protection was without merit. *S. v. Rudolph*, 293.

TAXATION**§ 6.2. Necessary Municipal Expenses and Necessity for Vote**

A cooperation agreement entered into by the City of Durham and the Durham Redevelopment Commission whereby the city obligated itself to provide funding for one-third of the cost of the urban renewal plan did not pledge the faith and credit of the city in violation of Art. VII, § 6 of the N.C. Constitution. *Campbell v. Church*, 117.

§ 28.1. Tax on Trust Income

Trial court erred in concluding that income from a testamentary trust paid to the Episcopal Diocese of N.C. was subject to the confiscatory tax imposed by provisions of the Internal Revenue Code on accumulations by private foundations. *Griffin v. Fraser*, 582.

TAXATION — Continued**§ 31.3. Exemptions from Sales Tax**

A company engaged in the business of leasing motor vehicles is entitled to an exemption from sales tax on the sale of its lease vehicles to private individuals where it paid the sales tax on the lease of the vehicles. *Rent-A-Car Co. v. Lynch*, 709.

§ 38.3. Payment of Tax Under Protest; Demand for Refund

Where a taxpayer and the Dept. of Revenue agreed on an installment plan for the payment of a sales tax assessment, the taxpayer made a timely demand for a refund of the entire assessment, including each installment, where he made a written demand for refund within 30 days after payment of the last installment. *Rent-A-Car Co. v. Lynch*, 709.

TRADEMARKS AND TRADE NAMES

§ 1. Generally

In an action for an injunction to prevent defendants from doing business as R & R Fuel Oil Service, there was sufficient evidence from which to find that there was a sale of the business by defendants to plaintiffs, and defendants' contention that R & R Fuel Oil Service was a personal trade name that would not be conveyed with the sale of the business was without merit. *Sanders v. Walker*, 355.

TRIAL

§ 4. Nonsuit for Failure to Prosecute

Trial court did not err in failing to dismiss an action instituted in 1966 for failure to prosecute. *Deutsch v. Fisher*, 304.

§ 9.2. Ordering Mistrial

In an action for breach of contract by failing to construct a house in a workmanlike manner, trial court did not err in ordering a mistrial "to further the ends of justice" when plaintiffs failed to present competent evidence of defects and damages because they were unrepresented by counsel. *Thompson v. Construction Co.*, 240.

TRUSTS

§ 5.1. Court Proceedings to Construe Trust

Declaratory judgment establishing the order of priority for payment of claims against a trust was ambiguous and incomplete. *Bank v. Robertson*, 403.

It is imperative that any judgment directing the application of assets comprising both principal and income interests of a trust to the payment of various claims against the estate designate that interest to be used in meeting any particular claim. *Ibid.*

§ 8. Income and Persons Entitled Thereto

Cause is remanded for a hearing and determination by the trial court as to the effect of pour-over provisions of two testamentary charitable trusts and the rights of beneficiaries of those trusts. *Griffin v. Fraser*, 582.

UTILITIES COMMISSION

§ 22. Power to Change Rates

Charges incurred for increased storage capacity and paid to the natural gas wholesaler are not part of the wholesale cost of natural gas within the meaning of G.S. 62-133(f), and the increased cost cannot be reflected in the retail rates automatically. *Utilities Comm. v. Industries, Inc.*, 477.

VENDOR AND PURCHASER

§ 5. Specific Performance of Contract to Sell Land

The "widow and sole heir at law" of the deceased defendant was properly made a party to an action for specific performance of a contract to sell land. *Deutsch v. Fisher*, 304.

WATERS AND WATER COURSES

§ 3. Natural Streams; Use of Water

Plaintiff riparian landowners were not entitled to judicial review of an informal fact finding hearing to determine whether defendant should initiate a proceeding to declare the Yadkin River Basin a capacity use area and to subject its water users to a permit-letting system. *High Rock Lake Assoc. v. Environmental Management Comm.*, 699.

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

The statute prohibiting the possession of a firearm by persons convicted of certain felonies is not unconstitutionally vague and does not create unconstitutional classifications. *S. v. Tanner*, 668.

§ 3. Discharging a Weapon

State's evidence was insufficient for the jury in a prosecution for feloniously discharging a firearm into an occupied dwelling. *S. v. Heaton*, 233.

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